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TO AMEND THE FEDERAL AVIATION ACT OF 1958

91-1

HEARINGS

BEFORE THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-FIRST CONGRESS

FIRST SESSION

ON

S. 1373

TO AMEND THE FEDERAL AVIATION ACT OF 1958 TO EXTEND THE AUTHORITY OF THE CIVIL AERONAUTICS BOARD OVER ACQUISITION OF AIR CARRIERS TO INCLUDE REVIEW OF ACQUISITION OF AIR CARRIERS BY NONCARRIERS

MARCH 18, 20, AND 26, 1969

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TO AMEND THE FEDERAL AVIATION ACT OF 1958

TUESDAY, MARCH 18, 1969

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee met at 10 a.m. in room 5110, New Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee), presiding.

Present: Senators Magnuson, Hart, Moss, Spong, Cotton, Hansen, and Baker.

The CHAIRMAN. The committee will come to order.

OPENING STATEMENT BY THE CHAIRMAN

The Chair has a short statement on the matter before us. Today we initiate hearings on S. 1373, a bill which was introduced by Senator Cotton and cosponsored by Senators Dirksen, Magnuson, Mansfield, and Pastore.

This measure would empower the Civil Aeronautics Board to prohibit any acquisition of control of an air carrier by a noncarrier if such acquisition was found to be not in the public interest. The Board already has such power if acquisition is sought by another common carrier or by one involved in any phase of aeronautics.

This bill deals only with the aviation segment of the transportation industry. However, the basic issues raised by acquisition attempts by noncarrier interests, extend to other transportation services as well. There has been considerable activity involving acquisition of carriers regulated by the ICC. We have introduced a bill similar to the one before us today that would empower the ICC to review any acquisition by a noncarrier of a carrier subject to regulation by that agency.

The entry of noncarriers into the transportation field has aroused considerable concern. Transportation services are provided upon the basis of public convenience and necessity. Government regulates the various transportation entities to assure safe, efficient, and economical operation for the benefit of the public. The underlying issue is whether those entities required to be operated in the public interest, may be acquired by those not involved in the business of transportation, and often already heavily committed to other economic interests, without a finding by the appropriate regulatory agency that the transportation entity involved will continue to be operated in the public interest.

We appreciate at the outset, that an appropriate decision by the Congress on this matter, will require careful study, discussions, and witnesses. The ability to buy stock and engage in basic industries, is an

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important attribute of our private enterprise system. We must not unreasonably impair that attribute in assuring that our transportation system operates efficiently and in the public interest.

Because of the urgency of this matter, which has been before the Congress for only the past 10 days or 2 weeks, we have called our first witnesses from the regulatory agencies to determine their attitude generally on the objectives of the bill.

There will be other witnesses, and we will hear them as rapidly as possible. I will place in the record at this point a copy of the bill and agency comments thereon.

(The material referred to follows:)

[S. 1373, 91st Cong., first sess.]

A BILL To amend the Federal Aviation Act of 1958

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Aviation Act of 1958 be amended as follows:

(1) Section 407(b) is amended by adding the following additional sentence: "Any person owning beneficially or as trustee, more than 5 per centum of the capital stock or capital, as the case may be, of an air carrier shall submit annually, and at such other times as the Board may require, a description of the shares of stock or other interest owned by such person, and the amount thereof."

(2) Section 408 is amended by striking subsection 408(a)(5) in its entirety, and inserting in lieu thereof the following:

"(5) For any air carrier or person whether or not controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;"

(3) Section 408 is further amended by adding the following new subsection 408(f):

"For the purpose of this section, any person owning beneficially 5 per centum or more of the capital stock or capital of an air carrier shall be deemed to be in control of such air carrier unless the Board finds otherwise."

SEC. 2. The amendments made by this Act shall be effective as of March 7, 1969: *Provided, however,* That no criminal penalties shall be applicable to any person who acquired control of air carrier between March 7, 1969, and the actual date of enactment of these amendments.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., April 3, 1969.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for views on S. 1250 and S. 1373, "To amend the Federal Aviation Act of 1958."

The proposed legislation would require beneficial owners and trustees owning more than 5 percent of the capital stock or capital of an air carrier to disclose their holdings periodically to the Civil Aeronautics Board. At the present time, such disclosure acts only to identify the holders of record of capital stock. The proposed legislation would also prohibit any person from acquiring 5 percent or more of the capital stock or capital of an airline without CAB approval. Existing legislation imposes this prohibition only on persons engaged in various phases of aeronautics. The bills are identical, except that S. 1373 contains a retroactivity clause.

The proposed legislation is not of primary interest to this Department and the Department has no comment to make on its general merits.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

ROY T. ENGLERT,
Acting General Counsel.

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DEPARTMENT OF STATE,
Washington, March 25, 1969.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Secretary has asked me to reply to your letter of March 10, 1969, requesting any comments the Department of State may care to offer on S. 1373, "a bill to amend the Federal Aviation Act of 1958."

We understand that the purpose of this proposed legislation is to extent the provisions of Sections 407(b) and 408 of the Act to any person acquiring control of a US air carrier and to define "control" as ownership of 5 percent or more of the stock of a US air carrier. Any such persons would be required to present an application to the Civil Aeronautics Board for approval. At present, a person who is not an airline or a common carrier is not subject to these provisions of the Act.

The Department of State supports such legislation and recommends its enactment. While this Department would leave it to others to comment on technical legal points, we believe that the following principles should be retained in the bill:

1. The bill should be nondiscriminatory as between US and foreign citizens in order to avoid any possible inconsistency with international obligations of the United States. It presently does so by referring to "persons" in general.

2. The relevant criterion for approval or disapproval by the Board should be the "public interest," as presently provided for in Section 408(b) of the Act and as contemplated in the proposed legislation. The Department assumes that the Board would, as it has in the past, consult with the Department of State to determine whether there are any foreign relations or international aviation policy considerations which should be taken into account in particular cases involving acquisition of control by foreign persons.

The Bureau of the Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely yours,

WILLIAM B. MACOMBER, Jr.
Assistant Secretary for Congressional Relations.

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., April 7, 1969.

Re S. 1250 and S. 1373, 91st Congress.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge receipt of your two separate requests of March 27, 1969 for the Commission's comments on S. 1250 and S. 1373, respectively, copies of which were enclosed with your letters. Both bills were introduced by Senator Cotton and would amend Sections 407(b) and 408 of the Federal Aviation Act of 1958. S. 1373 appears to be a later modified version of S. 1250.

As you may recall, I appeared before your Committee on March 18, 1969, pursuant to the Committee's request to testify on S. 1373, at which time I also submitted a prepared statement for the record. I believe that testimony and prepared statement adequately represented the Commission's position, and we do not have anything further to add at this time. However, I am enclosing herewith an additional copy of my prepared statement of March 18, 1969 to complete your records.

Sincerely,

HAMER H. BUDGE,
Chairman.

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COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., March 26, 1969.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: We have your letter of March 10, 1969, asking for our comments on S. 1373, introduced by Senator Cotton. It is concerned with the acquisition of control of air carriers.

The bill would amend sections 407 and 408 of the Federal Aviation Act of 1958, 49 U.S.C. 1377 and 1378, to provide that ownership of five percent or more of the capital stock or capital of an air carrier is to be considered control of that carrier (proposed new subsection 408(f)); to require that such holders of five per cent ownership submit to the Civil Aeronautics Board annually, or oftener if required, a description of the stock or other interest owned and the amount thereof (proposed amendment to subsection 407(b)); and to prohibit acquisition of control without Board approval (new language proposed to be substituted for subsection 408(a)(5)). The second section of S. 1373 would make the amendments effective March 7, 1969, subject to the proviso that criminal penalties will not apply to anyone acquiring control of an air carrier between that date and the actual date of enactment.

We note that a bill similar in purpose, H.R. 8261, was introduced in the House of Representatives on March 5, 1969. In a press release on the same day, the Honorable Harley O. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, announced that he had introduced this and two other bills to serve as vehicles for the purpose of holding committee hearings concerning acquisition of control of air carriers by persons who are not carriers.

S. 1373, if enacted, would not directly affect the interests of the United States as a user of air transportation services. We are aware, however, that of late there has been a significant increase in the formation of conglomerate business organizations through acquisition of control, merger or consolidation. The advantages of diversification of investment to the parent company presumably helps inspire these arrangements; while they may not be monopolistic in the traditional sense, they arouse concern because they tend to concentrate control of business and industry and enhance competitive positions, particularly in relation to small business.

In the common carrier industry, the several modes of transportation are subject to regulation in the public interest; there is some apprehension that noncarriers which acquire control of common carriers may be unable to discharge properly the responsibilities and obligations to the public with which such carriers are charged. There is a segment of public opinion which would maintain that S. 1373 looks to minimizing possible deleterious effects resulting from the control of air carriers by persons who are not carriers. If the facts produced at hearings and from other sources support this opinion, the bill is in the public interest. We have no special knowledge or information on this subject and therefore make no recommendation as to the consideration of S. 1373 by your Committee.

Sincerely yours,

R. F. KELLER,
Acting Comptroller General of the United States.

FEDERAL TRADE COMMISSION,
Washington, D.C., April 6, 1969.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request of March 10, 1969, for the comments of the Commission on S. 1373, 91st Congress, 1st Session, a bill "To amend the Federal Aviation Act of 1958."

The purpose of this bill is to plug a regulatory loophole by prohibiting any person not engaged in aeronautics from acquiring control of an air carrier unless such acquisition is approved by the Civil Aeronautics Board. S. 1373 would create a presumption that ownership of 5 percent or more of the capital

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stock or capital of an air carrier does constitute control unless the Board finds otherwise.

However desirable the objective of this bill may be, the Commission does not believe that it should or need be accomplished in such a manner as to violate our fundamental national economic policy as reflected in the antitrust laws.

When Congress committed the regulation of the aviation industry to the Civil Aeronautics Board, it did not intend to displace the antitrust laws beyond that specifically necessary for the air transportation industry. In its limited function of regulating a specific industry, the Board does not consider or evaluate the anticompetitive effects of an acquisition on non-aviation industries. Any anticompetitive effects *within* the aviation industry is only one of many factors which the Board may consider in determining whether the acquisition, merger or other change of control is in the "public interest".

However, under section 414 of the Federal Aviation Act, when an acquisition, merger, or other change of control receives the Board's approval, as required by section 408, the parties affected by such order are "relieved from the operations of the antitrust laws," including the Sherman Act. If S. 1373 were enacted, the Board's approval of the acquisition of control of an air carrier by a person not engaged in air transportation could be interpreted as extending this antitrust immunity to any resulting anticompetitive effects in non-aviation industries. This would violate our national economic policy, as stated in the Clayton Act, which prohibits an acquisition "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The enactment of S. 1373 would also lead to an incongruity as to the standards to be applied in evaluating the effects of an acquisition, merger or change in control. The acquisition of an air carrier by a company not engaged in aviation would be evaluated by the Board under its limited "public interest" standard of assuring the sound development of an air transportation system. On the other hand, the acquisition of the same non-aviation company by the same air carrier would be evaluated by the established Clayton Act standard of whether or not there was a substantial lessening of competition in any line of commerce in any section of the country.

The Commission believes that the purpose of this bill can be accomplished without damaging our basic national economic policy by providing no immunity from the antitrust laws for those transactions which involve air carriers but which have anticompetitive effects outside of the air transportation industry. We suggest that section 414 of the Federal Aviation Act be amended by adding at the end of that section the following new subsection:

"*Provided*, That no order of approval shall relieve from the operation of the Sherman Act, 15 U.S.C. § 1, *et seq.*, the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.*, or the Clayton Act, 15 U.S.C. § 12, *et seq.*, acts, practices or transactions which violate these laws with respect to any line of commerce other than transportation."

The Commission would have no objection to the enactment of S. 1373 if amended along the lines suggested above.

By direction of the Commission.

EVERETTE MACINTYRE,
Acting Chairman.

DEPARTMENT OF THE AIR FORCE,
Washington, April 11, 1969.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 1373, 91st Congress, a bill "To amend the Federal Aviation Act of 1958". The Department of the Air Force has been designated to express the views of the Department of Defense.

The purpose of S. 1373 is understood to include the following objectives: (1) Identification of conflicting interests by expanding requirements for disclosure of stock ownership; (2) Prevention of any person acquiring control of an air carrier in any manner without an approval by order of the Civil Aeronautics Board;

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and (3) The definition of "control" of an air carrier in consolidation, merger and acquisition of control matters to mean any person owning beneficially 5 per centum or more of the capital stock or capital of an air carrier unless the Board finds otherwise.

The Department of Defense recognizes the need for a strong, stable and modern civil air transportation industry to meet essential national defense requirements. This industry directly supports the national defense through the mobilization base contracts of the Military Airlift Command, including Civil Reserve Air Fleet (CRAF) provisions, and through other air transportation service arrangements to meet Department of Defense peacetime needs. Consequently, the Department of Defense favors effective regulation of the industry, including regulation of changes in control of air carriers which might be detrimental to the industry. The Department of Defense defers, however, to the Civil Aeronautics Board as to the need for, or desirability of, S. 1373 to enable such effective regulation.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

ROBERT H. CHARLES,
Assistant Secretary of the Air Force (Installations and Logistics).

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D.C., April 8, 1969.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your request for the views of this Department concerning S. 1373, a bill to amend the Federal Aviation Act of 1958.

Section 407(b) of the Federal Aviation Act presently requires certain reports by air carriers as to the stockholders or members holding more than 5% of the entire capital stock or capital of the carrier. Section 408 makes it unlawful, without approval by the Civil Aeronautics Board, for control of an air carrier to be acquired by (1) an air carrier, (2) anyone controlling an air carrier, (3) any other common carrier, or (4) anyone engaged in any other phase of aeronautics.

S. 1373 would amend Section 407 to require an owner of more than 5% of the capital stock or capital of an air carrier to submit annual reports describing the shares of stock or other interest owned by him and the amount thereof. The bill would amend Section 408 by prohibiting, without Civil Aeronautics Board approval, the acquisition of an air carrier by "any . . . person whether or not controlling an air carrier," and by defining control of an air carrier as beneficial ownership of 5% or more of the capital stock or capital of the air carrier.

The principal purpose of this bill is to require CAB approval of any proposed acquisition of 5% or more of the capital stock or capital of an air carrier. The CAB has recently approved some aeronautic mergers as being in the public interest, such as the Trans International Airlines merger into Transamerica Corporation and the Braniff International merger into Ling-Temco-Vought. However, several air carrier acquisitions by non-aeronautic companies are currently being discussed, especially the Resorts International acquisition of a large bloc of shares in Pan American World Airways. S. 1373 would require CAB approval of such conglomerate mergers involving air carriers and non-aeronautics companies.

Control of air carriers by non-aviation interests could dilute the progressive transportation policies of the carriers and have adverse side effects including, but not limited to, possible curtailment of aircraft equipment sales. One of the purposes of the Federal Aviation Act was to guard air carriers from control by special interest groups. S. 1373 would strengthen this policy.

This Department supports enactment of legislation for the purpose of S. 1373. However, we would defer to the CAB as to whether the provisions of S. 1373 would best carry out such purposes.

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We have been advised by the Bureau of the Budget that there would be no objection to the submission of our report to the Congress from the standpoint of the Administration's program.

Sincerely,

JAMES T. LYNN,
General Counsel.

The CHAIRMAN. We know that the CAB has not, Mr. Chairman, had too much time to go into this matter. But I think you are well aware of the situation involved. Therefore, we felt it incumbent that we would get the ideas of the Board on this piece of legislation.

The legislation itself we think meets the problem for the transfer of some of this authority. There may be some technical suggestions as to amendments and other matters to fit into appropriate procedures by the CAB if and when these applications come in. We can meet that when we come to it. We will be glad to hear from you.

Senator COTTON. Mr. Chairman, before we do, may I supplement your statement with two brief points?

The CHAIRMAN. Yes; go right ahead.

Senator COTTON. First, I think the record should show that I introduced this bill because there appeared to be a sense of urgency. I also introduced this bill with the knowledge of and with the authority of the chairman during his absence. Otherwise it would be the chairman's bill and his name would appear first on the bill.

Second, as noted by the chairman in his opening statement, it will take time and careful study to have proper regulation in this field so as to obtain the objective of this legislation not only with regard to air carriers but also subsequently with regard to other carriers, as may be required.

However, while recognizing the larger problem of the total transportation industry, the situation which has given rise to the legislation now before the committee, in the opinion of the Senator of New Hampshire, indicates we ought to report the bill as soon as possible. Perhaps we could do so with the understanding that we would meet the larger issue with subsequent legislation. The present situation, however, might be termed something of an emergency.

That is all I wish to say, Mr. Chairman.

The CHAIRMAN. There are bills, too, that have been introduced by Members of Congress including the chairman and the Senator from New Hampshire and others, which involve other modes of transportation such as the railroads, in which the same situation apparently seems to be shaping up.

There was even some discussion about it the other day when we had the FCC up here on the question of public license. I suspect that before we are through with these matters that there may be some suggestion that we will take a good long look in the maritime field in the same way.

We were talking about transportation which is in the public interest, and which requires a public license of convenience and necessity.

Senator Hart?

Senator HART. May I comment at this point to endorse the concepts of yours and Senator Cotton's bill.

Any time I have a chance to underscore the concern that some of us have about the trend toward conglomerate mergers, I take it. And it is

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not just carriers, it is not just railroads being acquired by toothpick makers, or freight forwarders, or by shoe manufacturers. It reaches across the whole economy.

While this may be the way to respond to the trend when it affects regulated industry, it leaves unanswered the much larger problem of what do we do about the trend generally.

Insurance companies acquired by noninsurers, for example. What is the motive, how does it affect the public interest?

Banks, you name it; it has occurred. It is occurring at an increasingly rapid rate.

I hope that these hearings and the focus that the bill before us gives us, will attract still greater interest and increased measure of concern that all of us should have with respect to a trend that leads no one is sure where. Certainly, unless arrested, it can produce a vastly different kind of society than the one traditionally we think this competitive system of ours requires.

The CHAIRMAN. Mr. Chairman, we would be glad to hear from you on the bill before us. I am sure that Senator Hart, the chairman, and all understand we have to make a start here.

Senator HART. It is a good start. It is the right way to begin.

The CHAIRMAN. Time is of the essence. We are making a beginning, and we expect to go forward with this within the jurisdiction of this committee.

Senator HART. My comment was not to be critical of the points of the bill. I think it is the correct response. The chairman has indicated it is only a limited jurisdiction that this committee can concern itself with, with respect to the conglomerate merger. All of us share responsibility in this.

The CHAIRMAN. And we might as well be very frank. I know we are interested in the whole field, transportation and otherwise, of paper corporations, their background and their interest in becoming involved in particular matters of this type. We are going to be very careful about our facts.

I think this is one thing that is causing great concern among the people of this country.

Go right ahead.

STATEMENT OF HON. JOHN H. CROOKER, JR., CHAIRMAN OF THE CIVIL AERONAUTICS BOARD; ACCOMPANIED BY JOSEPH B. GOLDMAN, GENERAL COUNSEL, AND THOMAS L. WRENN, CHIEF AIR EXAMINER

Mr. CROOKER. Mr. Chairman, members of the committee, the Board appreciates the opportunity to comment on S. 1373 and other bills which may be before the committee, which would require Board approval for certain acquisitions of stock of air carriers which are now outside the Board's jurisdiction, and which would strengthen the reporting provisions of the act with respect to stock ownership. While the Board endorses the objectives of the bills, we have some suggestions to make which, we believe, would provide a bill which would make for sounder administration from the Board's viewpoint, and at the same time accomplish what we believe to be the basic objectives of the legislation.

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As the committee knows, section 408 of the Federal Aviation Act presently requires Board approval before certain classes of persons may acquire control of an air carrier. Those persons are another air carrier, any person controlling another air carrier, any other common carrier, or any person engaged in any other phase of aeronautics.

However, a person not falling within any of these categories is free at this time to acquire control of an air carrier and in effect to take over its operations without any requirement of Board approval. This situation is incongruous in light of the fact, that a technical transfer of the carrier's certificate authority does require Board approval, whereas the same practical result can be achieved through change in stock ownership without Board approval. It is our understanding that the basic purpose of the instant bills, is to plug the loophole, and to insure that the Board has the opportunity to veto any change in control, which is finds to be contrary to the public interest.

Closing this loophole would be consistent with the overall purposes and provisions of the statute since the identity of the persons who control an airline, can affect the quality of the air carrier service. Thus, when the Board initially determines whether to issue a certificate to a given carrier, it takes into account the identity and qualifications of the persons controlling it in determining whether the carrier is fit, willing, and able to provide the desired transportation services. These same considerations are taken into account where there is a technical transfer of the certificate, which, as previously noted, requires Board approval.

We believe that the Board accordingly should have an opportunity to consider, whether the persons who wish to obtain control of an airline, are capable of operating it. Certainly, everyone should agree that it would be desirable for the Government to be able to forestall the seizures of air carriers by amnipulators, whose activities may adversely affect the carriers' fitness. The air transportation system is one of our greatest assets in times of national emergency, and this Nation should be able to protect that asset. It is disturbing to realize, that under the present law, the management and policies of a carrier engaged in vital defense operations during a national emergency, could be completely altered, and the operations disrupted, by a change in stock ownership which was not subject to scrutiny by anyone and which even might involve ownership by foreign interests.

Thus far, the air carrier system has been fortunate in that, despite the gap in regulatory control, no situation appears to have arisen, in which any disastrous effect might have resulted from changes in control which were not subject to Board approval. However, the air carriers have now reached a position where they are attractive to large financial enterprises, and it is well known that in the last several months, some acquisitions of air carriers have been proposed or attempted. Some of these proposals have been by persons subject to section 408 of the act, whereas others have been by persons who are not.

The bills before the committee, S. 1373, particularly mentioned earlier, and also S. 1250, would solve this problem by amending the present section 408(a)(5) so as to subject any acquisition of control of an air carrier by anyone to the Board's prior approval. It would then solve the problem of just what degree of stock ownership consti-

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S. 1373 contains a provision making it retroactive to March 7, our draft does not contain any such provision. We have no objection to a retroactive provision, but merely defer to the views of the Congress on this point.

I should also add that enactment of legislation of this type will increase the Board's workload and will require a few more people and a few more dollars in our annual appropriations to hire them. However, we believe the cost would be considerably less under our proposal than under the bills before the committee because of the greater procedural flexibility which would be afforded to the Board. We also believe that the benefits to the air transportation system under either of the bills would far outweigh whatever the cost would be of administering the provision.

In conclusion, we endorse what we understand to be the general objective of this bill, to fill the regulatory gap under which a practical transfer of operating authority may occur by reason of stock acquisitions not now subject to Board approval. This Government and the citizens of this Nation have a considerable investment in the air carrier system which has been evolved over the years to meet the needs of the foreign and domestic commerce of the United States, the postal service and the national defense. That system and investment should not be exposed to possible adverse impact by the regulatory gap which presently exists in the control provisions of the statute.

Rather, it should be safeguarded by enacting legislation along the general lines of S. 1373 and along the lines here commented upon.

(The draft bill referred to follows:)

A BILL To amend the Federal Aviation Act of 1958, as amended, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Aviation Act of 1958, as amended, is further amended as follows:

SECTION 1. Section 407(b) is amended by substituting the phrase "5 per centum of any class of the capital stock or capital" for the phrase "5 per centum of the entire caiptal stock or capital" appearing in the first sentence thereof, and is further amended by adding the following additional sentence: "Any person owning, beneficially or as trustee, more than 5 per centum of any class of the capital stock or capital, as the case may be, of an air carrier shall submit annually, and at such other times as the Board may require, a description of the shares of stock or other interest owned by such person, and the amount thereof.".

SEC. 2. Section 408(a) is amended by redesignating paragraphs (6) and (7) as paragraphs (7) and (8) and by inserting immediately after paragraph (5) the following new paragraph:

"(6) For any person to acquire, beneficially or as trustee, 10 per centum or more of any class of the capital stock or capital of an air carrier, as the case may be, or for any person holding 10 per centum or more of any class of such person stock or capital to increase its holdings by 5 per centum or more: *Provided,* That the Board may by order exempt any acquisition from this requirement to the extent and for such periods as may be in the public interest."

SEC. 3. Section 408(b) is amended by striking the period at the end thereof and adding a colon, and by adding thereafter the following proviso:

"*Provided further,* That in any case in which an order of approval is required hereunder only by reason of the requirements of section 408(a)(6), the Board may enter such order pursuant to such procedures as it by regulation may prescribe."

The CHAIRMAN. First of all, we appreciate the Board taking the time and effort to suggest to us a bill which is more consistent with the pro-

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cedures you are talking about, and with more efficiency in getting at the objectives, than the one which we introduced, which I pointed out earlier, we had to do in a hurry for obvious reasons.

In your statement you say:

> The Board also endorses the proposal that section 407(b) be amended. As previously stated, the section presently provides that air carriers shall submit lists to the Board showing the names of stockholders holding more than 5 percent of the capital stock of the carriers, and the proposed amendment would place the same reporting requirement upon the persons who actually hold the stock. The amendment, therefore, would not embody any new regulatory concept but would serve to enable the Board to obtain reports from persons other than air carriers concerning stock ownership.

I don't understand what you mean by that.

Mr. CROOKER. The holder of the stock, the person owning the stock, would also have to report this.

Suppose the stock that is owned in excess of 5 percent, is in two or three different street names. The carrier would not know the true beneficial owner of the stock.

Senator COTTON. Pardon me.

The CHAIRMAN. Go right ahead. I want to clear it up.

Senator COTTON. Is it possible also, in the matter of stock in air carriers—as is the case with other corporations—that somebody may purchase stock, the seller signs for it, and holds it without recording it with the airline? For example, John Doe may hold such stock which he sells to Richard Roe, endorsing and delivering the certificate to Richard Roe to hold. However, insofar as the airline's knowledge is concerned, John Doe still owns the stock.

Mr. CROOKER. Yes, sir. When I said the stock might be in street names, it might be in the names of other persons than the true beneficial owner. This would place on the true owner the obligation to report.

The CHAIRMAN. If John Doe owned 15 percent of the stock, would they report 15 percent, or would they report that he owned 5 percent?

Mr. CROOKER. The carrier reports the exact percentage.

The CHAIRMAN. The exact percentage?

Mr. CROOKER. Yes, sir.

The CHAIRMAN. Or number of shares?

Mr. CROOKER. Yes; that is true, the number of shares.

The CHAIRMAN. So this would tighten up the requirement a little bit.

Mr. CROOKER. It would not take away the responsibilities of the carrier to report, but it would also require the stockholder to report.

The CHAIRMAN. You make a suggestion that the bill be modified to 10 percent instead of 5 percent. I am sure the committee will consider that. That is a difficult decision to arrive at.

I think the reason we took the 5 percent is because of the existing requirement which requires the reporting of over 5 percent.

The committee will have to work out that figure. You do point out, it would be a little easier to administer if you had the 10 percent, you believe.

Mr. CROOKER. Senator, we are not intent on the 10-percent figure. We think that is a judgment matter. We did suggest the possibility

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that there be a difference in the percentages required for reporting ownership to us, and then a second step or threshold of a slightly larger percent, when our prior approval of acquisition is required.

The CHAIRMAN. If somebody were going to buy 9 percent of an airline stock, and in the bill and under the present setup he would have to report that to you?

Mr. CROOKER. That would be reported after the acquisition.

The CHAIRMAN. After the acquisition?

Mr. CROOKER. Yes.

The CHAIRMAN. Would you at least have some record that that was going on until they reached whatever the figure might be—say 10 percent was the figure you used—would you be aware of this fact? So that if they wanted to acquire over 10 percent, you would have some knowledge of this movement, this buying, who they were, their motives and everything else?

Mr. CROOKER. We would certainly have knowledge of the fact that they were acquiring the stock. We might not know the motives.

The CHAIRMAN. The red light might go up. That would give you a little time to look at it.

Mr. CROOKER. Yes.

The CHAIRMAN. Or the yellow light at least.

Mr. CROOKER. Yes, sir.

The CHAIRMAN. When they reported it, you would know who they were, and their background. This committee feels that on something like this, when talking about running an airline, we think it is a responsible business. There is air safety involved, too.

Let me ask you, and I believe we have covered this: I have a question as to what would be control. That is a hard figure to evaluate. It might be 5 percent in one case, and it might take 20 percent in another case.

Mr. CROOKER. Yes, sir. I remember many years back, Robert Young said he controlled the New York Central when he owned 4 percent of the stock.

There might be a local service carrier now where there are other sizable interests, and a man might acquire 15 percent of the stock without being able to control it. It is a very difficult figure to fix.

The CHAIRMAN. There may be a time where some airlines might need somebody to buy 15 percent of the stock—I am talking of some of the smaller ones—to give them the financial support they are going to need. That is possible, isn't it?

Mr. CROOKER. Yes, sir.

The CHAIRMAN. Depending upon who it may be, and depending upon whether it is a legitimate attempt to get into aviation, and particularly if it involves transportation-oriented people who know their business.

Does the CAB know who presently controls each air carrier?

Mr. CROOKER. We have the information, Mr. Chairman, from our reports of ownership of stock by all officers and directors, and by all other persons who own 5 percent or more. To whatever extent that gives us the information as to control, of course we have it.

Essentially, that is the only information we now have.

The CHAIRMAN. And, of course, it is possible in some cases that the

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management of the line do not own enough stock to even report 5 percent in some cases, isn't that true?

Mr. CROOKER. There is a requirement that the officers and directors report the amount of stock they own.

The CHAIRMAN. But it may not add up to 5 percent.

Mr. CROOKER. That is true.

The CHAIRMAN. It may not add up to 5 percent in many cases. If they would own 25 or 30 percent, they would be pretty much protected against a raid, wouldn't they?

Mr. CROOKER. Yes, sir.

The CHAIRMAN. I mean between them.

What if you have an option to buy 5 percent or 10 percent? Would you have to change the bill so that we would take care of that, too, or do you think we should wait until they exercise the option?

Mr. CROOKER. We provided in our draft——

The CHAIRMAN. Is that in your draft?

Mr. CROOKER. I don't know that it is in there. We did expand the concept to relate to any class of stock. Up to this time the statute has referred to—in section 407—to a certain percentage of the capital stock. In our effort to help this cover as much as the given percentage of any class of stock—for example, this might be voting stock—when it didn't amount to 5 percent of all the capital stock, we suggested the wording of any class of capital stock. Whether this would be construed to include rights and warrants, I don't know. That point deserves consideration.

The CHAIRMAN. Is there any restriction on air carriers buying noncarrier corporations?

Mr. CROOKER. So long as the other corporation is not engaged in any phase of aeronautics, there would be no restriction.

The CHAIRMAN. Would the Board think there should be some direct connection with aeronautics? That is a pretty broad field. I know that there is a restriction on the manufacturing end of aeronautics versus the carrier end.

Suppose they wanted to acquire a restaurant or a catering company, or something of that kind, which has some connection with air travel.

Mr. CROOKER. Mr. Chairman, we have maintained a policy with respect to the local service carriers, who are on subsidy, that if they engage in other fields, and if there is a profit from the other operation, we will take that into account in considering payments to air carriers. But if they sustain a loss, we don't take that into account.

But with respect to the nonsubsidized carriers, I assume a good many of them feel that the guest accommodation business deserves some connection with the line, as TWA has made a connection with the Hilton Hotel Corp., and Pan American with the Intercontinental Hotels, and so on.

The CHAIRMAN. That would, of course, discourage the local transport line from branching out unless they knew that it was a pretty sound proposition. Because under the law, that profit would have to be considered in their subsidy; wouldn't it?

Mr. CROOKER. Yes, sir.

The CHAIRMAN. Because they couldn't take the losses. It is a little like the income taxes. You have to report your winnings, but you can't deduct your losses.

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I don't suppose you can answer this question specifically. You might answer it generally. What is the extent of this movement of other companies to take over supplementary carriers, local service, trunks, air taxis? I know that you don't know of every instance.

While we are sitting here today, some company in New York may be setting up ways and means of doing it, and we wouldn't know about it. Wouldn't you say that it is a fair statement that there is a trend to do this?

Mr. CROOKER. Mr. Chairman, we would be glad to supply for the record the information which appears on our accounting records furnished by the carriers, but a matter of public record. There are some seven or eight pages of single-spaced information about stock ownership in air carriers and companies that report to us.

The CHAIRMAN. We will be glad to have that in the record.

Mr. CROOKER. That does reflect such things, for example, as the Storer Broadcasting Co., owns a very large interest in Northeast Airlines. There isn't anything that would cause us concern about the identity of the people in Storer Broadcasting Co. But it is significant that they own 85 percent of that carrier.

We don't know how many takeovers are in the mill at this moment. We do have information on stock ownership after the acquisition occurred.

The CHAIRMAN. I think the committee would like to have that in the record.

(The information is as follows:)

STOCKHOLDERS OWNING MORE THAN 5 PERCENT OF ISSUED AND OUTSTANDING STOCK

Trunk industry	Holders	Percent of outstanding
Carrier:		
American Airlines, Inc	None	
Braniff Airways	Greatamerica Corp	80.06
Continental Air Lines, Inc	Merrill Lynch	7.90
Delta Air Lines, Inc	Don & Co	5.33
	Lerche & Co	5.1
	Merrill Lynch	5.15
Eastern Air Lines, Inc	None	
National Airlines	Dudley Swim	5.88
Northeast Airlines	Storer Broadcasting Co	85.67
Northwest Airlines, Inc	Kane & Co	9.11
	Lerche & Co	7.38
Trans World	None	
United Air Lines, Inc	None	
Western	Kane & Co	8.14
	Cede & Co	5.27

Source: Schedule G-41, "Persons Holding More Than 5 Percent of Respondent's Capital Stock or Capital," of CAB form 41. Data as of December 31, 1967.

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LOCAL INDUSTRY

Carrier	Holders	Percent of outstanding
Allegheny	None	
Bonanza	E. C. Converse	16.04
Frontier	RKO-General, Inc	54.16
Lake Central	Perry R. Bass c/o J. C. Gunter	5.17
	Laird & Co., Corp	24.90
Mohawk Airlines	Merrill Lynch	6.54
	Agway	7.16
North Central	Ed Phillips & Sons Co	13.1
	North American Life & Casualty Co.	5.4
	North American Life & Casualty Co. Profit Sharing Trust.	5.4
Ozark	F. W. Jones	21.50
Pacific Air Lines, Inc	Seton Associates	29.92
Piedmont	T. H. Davis	8.74
	Including & Co	5.94
Southern Airways, Inc	Frank W. Hulse	14.87
Trans Texas Airways	Minnesota Enterprises, Inc	49.69
	R. W. Pressprich & Co	10.81
West Coast Airlines, Inc	Nick Bez	20.85
	Auchincloss, Parker & Redpath.	5.71
	Marine Fishing & Packing Co	8.40

SUPPLEMENTAL INDUSTRY

Carrier	Holders	Percent of outstanding
American Flyers Airline	Virginia Pigman	20.00
	First Grant Crop	80.00
Capitol International	J. F. Stallings	22.82
	Rudolph S. Farrar	10.50
	Anne O. Stallings	46.35
Johnson Flying Service	Robert R. Johnson	76.84
	Arthur R. Pritzl	5.08
	John Pritzl	5.08
Modern Air Transport	Gulf American Corp	100.00
Overseas National	G. Stedman	7.6
	Pioneer Land Corp	29.1
	Charles C. Hickox	14.9
Saturn	Howard J. Keith	77.15
Southern Air Transport	F. C. Moor	20.00
	Stanley G. Williams	20.00
	Purcival Brundage	20.00
	Pukins McGuil	20.00
	George F. Tyler, Jr	9.00
Standard Airways	J. Barth & Co	7.00
	Bear Stearns & Co	13.00
	Pike Corp. of America	54.00
Trans International	Kirk Kerkorian	58.00
Universal Airlines	Universal Airlines Co	100.00
Vance International	Vance B. Roberts	67.00
World Airways, Inc	Edward J. Daly	81.00

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MISCELLANEOUS

Carrier	Holders	Percent of outstanding
Alaska Airlines	Merrill, Lynch, Pierce, Fenner and Smith, Inc.	6.91
Caribbean Atlantic	Dionisio Trigo Orbeta	80.01
Pan American	Cede & Co	7.13
	Kane & Co	5.26
Trans Caribeean:		
Class A, common	O. Roy Chalk	9.54
Class B, common	O. Roy Chalk	49.86
	Claire Chalk	48.73
Alaska Coastal	Sheldon B. Simmons	12.09
	O. F. Benecke	6.19
	Robert E. Ellis	8.12
	Lorraine Holden	6.01
	G. A. Bodding	5.12
	Alleine George	6.05
	Keith G. Wildes	6.66
	Bjarne C. Olsen	6.00
	F. O. Eastaugh	6.39
Cordova Airlines	Merle K. Smith	76.98
	Albert Swalling	10.66
	Asce L. Martin	10.66
Kodiak Airways	Robert Hall	46.15
	Robert L. and elen C. Hall	53.85
Northern Consolidated	R. I. Petersen	18.89
	John A. Walatka	5.25
	Rupe Investment Co	11.65
	Goodnews Bay Mining Co	10.22
Chicago Helicopter Airways, Inc	John S. Gleason, Jr	6.54
	John C. Brogan	6.45
	Appliance Credit Corp	8.64
	Cook Investment Company	14.60
Los Angeles Airways	Clarence M. Belinn	16.0
	Federal Eng. Corp	6.2
	Dean Witter & Co	9.4
	Automation Industries, Inc	5.7
New York Airways	Sterling National Bank and Trust Co.	28.4
	Atwell & Co	12.0
	Ince & Co	5.0
San Francisco & Oakland Helicopter Airlines, Inc		
Aspen Airways, Inc	Ringsby Airline Systems, Inc	100.00
Aloha Airlines, Inc	Hung Wo Ching	19.39
Hawaiian Airlines, Inc	John H. Magoon, Jr	37.3
Airlift International, Inc	James B. Franklin	5.54
Seaboard World		
Reeve Aleutian	Robert C. Reeve	45.675
	Janice M. Reeve	45.675
	Robert L. Hanson	8.65
Sien Consolidated	Sigurd Wien	24.15
	Fritz Wien	5.98
	William E. English	5.04
	Faulkner, Dawkins & Sullivan	10.60
	First National Bank of Fairbanks	6.00
	MAC & Co	7.72
Western Alaska	Albert W. Ball	29.47
	John F. Ball	12.38
	Myron S. Moran	29.47
	Clarence Wren	12.48
	Frances Wren	12.48

Senator COTTON. You referred to the Storer Broadcasting Co., and its interest in Northeast. You also indicated knowledge of its interest in the broadcasting company. But do your records show every controlling individual or group of an airline? Do your records show exactly what other activities such persons or groups are engaged in?

Mr. CROOKER. Senator, we don't feel that they do. We assume that if one such large corporation sought to branch out after its acquisition of some stock in an airline, and acquire a company in another phase of aeronautics, an application for approval of the arrangement would be filed with us. And if it were not so filed and we didn't get an enforcement matter, we would, of course, institute a proceeding.

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There might be someone who acquired a company and engaged in some other phase of aeronautics but who did not seek our approval, and with respect to which the facts had not yet come to our attention.

But this is, of course, an area where some concern might exist, but a company, again using Storer merely as an example, might seek to acquire control in still a third company.

Senator COTTON. In other words, except for outside information, as far as you know the X mining company out west could be controlling and managing an airline? Or the Y bank, some other institution, or a mutual could have such control, but your official records would not disclose those particular facts. Is that correct?

Mr. CROOKER. That is correct, sir. And I think that comes from section 407 imposing the reporting requirement only on the carrier. Therefore, the only information they furnish to us is the name of the record stockholder. Whereas if we expand the reporting requirements in 407, we would require the beneficial owner also to disclose that fact.

Senator COTTON. I didn't mean to interrupt. Thank you, Mr. Chairman.

The CHAIRMAN. That is all right. This poses questions.

Do you have the annual rate of return from all airlines on investment dollars of air carriers?

Mr. CROOKER. We have that information. I don't know that I brought it today, sir.

The CHAIRMAN. What I am trying to point out, does it compare favorably with other industries?

Mr. CROOKER. Mr. Chairman, as you probably know, 1967 and 1968 have not been exceptionally profitable years in the airline business.

The CHAIRMAN. I think it is important that we have those figures. You have them and I think we have them in some testimony here. They might at least give you some clues as to why these people want to invest in something at a lower return when they could invest in something at a higher return. There must be a good reason. I don't sit here and suggest it.

I am no financier, but there must be some other reason for it. It has been suggested that cash flow might be one of the reasons. I don't know.

I know it has been true with one or two smaller, so-called smaller railroads, that there have been attempts to take them over.

Senator Moss?

Senator Moss. Thank you, Mr. Chairman. I have no questions.

The CHAIRMAN. Senator Cotton?

Senator COTTON. I have an inquiry concerning this question of whether 5- or 10-percent ownership should be the measure for your board taking action.

Isn't it possible that it may be a little dangerous to establish any artificial percentage at all? For example, I think the attention of most of us was brought to the present situation not by the airlines themselves but rather by members of the executive branch of the Government. It was reported to me that there are at least two airlines which are in danger of having their management overturned and somebody engaged in either the hotel business or some other business taking them over.

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There is the thought—certainly on my part and I am sure on the part of others who sponsored this legislation, including the majority and minority leaders of the Senate—that action should be taken looking into the question of whether such could or should be done.

Suppose the present management of an airline controls only 3 percent of its stock, and somebody buys 7 percent with the intent of taking it over. If we establish a presumption at 10 percent in this bill, then what could you do in such a situation as I described?

Mr. CROOKER. Senator, I think there are differences of opinion as to whether the provision should merely read that the Board must give its prior approval for any person to acquire control, or whether some specified percentage might be set as a presumption that there is control.

It occurred to us that leaving it in the rather indefinite posture of control might entice a potential acquirer to acquire 7 or 12 percent or some other percent and not report to us, and solemnly maintain that this didn't involve control at all. So we thought that a certainty in the matter of a reporting requirement to the Board might be the more desirable, and leaving control undefined for this purpose.

Senator COTTON. As I understand it, under present law your Board actually has the necessary authority, but you would have to exercise it in such a drastic manner as to be something of a catastrophe.

In other words, if a certain group wants to get control of an airline by purchasing sufficient stock—whether it is 2, 3, or 5 percent——

The CHAIRMAN. Or 9 percent.

Senator COTTON. You could refuse to certify their new officers enabling them to operate the line. Right or wrong?

Mr. CROOKER. Not under present law.

Senator COTTON. I understood from reading your statement that you could refuse certification. That would put the airline out of business, at least temporarily.

Mr. CROOKER. If it is a potential new carrier, or if there is a potential transfer of certificate, we go into the matter of whether the group is fit, able, and willing. But we do not have the power where the takeover is accomplished, or sought to be accomplished, by acquisition of stock rather than by transfer of the certificate.

For example, within the last year we formally acted upon the acquisition of the Slick certificate by Air Lift.

Suppose in some other instance the takeover is not accomplished by transfer of the certificate, but merely by the controlling stock interest, whatever the percentage may be. We would have no jurisdiction over that.

Senator COTTON. I am still a little bit troubled for this reason: If a certain person or corporation acquires sufficient stock to oust the management of an airline, and to take over the operation of the airline by putting their officers in control—whatever the required percentage—there is no way now under the law that you can examine and decide whether the new management is fit to manage such airline and if not, to refuse them the authority to proceed to operate the airline. Is that true?

Mr. CROOKER. That is correct, unless the acquirer is in the area of being engaged in a phase of aeronautics.

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Senator COTTON. Is that the only qualification?

Mr. CROOKER. Yes.

Senator COTTON. My part of the country is served by Northeast Airlines and we are happy about its improved situation, so I don't want to keep using the Storer Broadcasting Co. as an illustration. However, unless you knew of Storer's acquisition by the report from Northeast as to the holders of the stock, then you wouldn't officially have had any knowledge of that acquisition, would you?

Mr. CROOKER. Officially, we would have no knowledge except through the report by Northeast.

Senator COTTON. And suppose that the Board might be disposed to consider that they were not, in your opinion, fit and proper people to operate the airline. What could you do about it under present law?

Mr. CROOKER. Nothing under present law.

Senator COTTON. It we rewrite this bill and put in 5, 7, or 10 percent, then you cannot act until somebody has acquired that percentage of stock, can you?

Mr. CROOKER. Senator. I would assume that where we talk about a matter of percentage as being prima facie control, we might, with the general control provisions in S. 1373, by possibly a formal proceeding, establish the fact that a small amount is control. But I think there is some desirability in having a fixed amount as the prima facie percentage that would involve control.

Senator COTTON. That is the point that I have been getting at.

What language in your suggested substitute bill or amendments to S. 1373 would give you the power to act if by acquiring 3 or 4 percent of the stock of an airline, somebody is able to take over the present management and oust it?

Mr. CROOKER. I suppose that the answer is that if there is an unusually small amount of stock, as I mentioned in the case of the New York Central, that might constitute effective control, there is no provision for prior approval under this proposal.

I would be happy if the chairman would permit the General Counsel of the Board, Mr. Goldman, to comment on this point.

The CHAIRMAN. Yes.

Mr. GOLDMAN. I think it is perfectly true that our draft bill would not cover the situation where there was, say, a proposed acquisition of stock of less than 10 percent.

I think the premise of the bill is that 10 percent, or 5 percent, as the committee proposed, would be very much on the safe side. It would be an extremely rare circumstance, although it is possible, that a very small block of stock could constitute a controlling interest.

By and large, we thought that keeping the percentage of stock as low as we have would really meet the substance of most of the situations and would in fact be more stringent than the bill that has been suggested elsewhere which would simply apply to control.

In other words, our bill covers the acquisition of stock, and requires prior approval whether or not it is a controlling interest.

The CHAIRMAN. Let me ask: If you didn't have a figure in the bill, a small amount, 1 percent, say, in a mutual fund, you would have to go into every transaction. I don't think we are trying to accomplish

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that. We are trying, as you pointed out, when does it get into the point where it is possible they can control it.

Mr. CROOKER. Exactly.

The CHAIRMAN. It could be 15 percent, and you could say all right.

Mr. CROOKER. You have put your finger right on the problem. I think we have to reach an accommodation between the objectives of the bill, which are to safeguard the national interest in the regulated transportation industry, and, on the other hand, not imposing undue burdens on the freedom of people to acquire and dispose of blocks of stock.

It seems to me that, while I am not a securities expert, to the extent that you require prior approval by a regulatory agency for the transfer or acquisition of a particular block of stock, you have imposed some kind of limitation on the free marketability of the securities.

And so we though that there was a reasonable accommodation in the number we selected, coupled with our suggestion that there be power in the Board to approve without a hearing.

The CHAIRMAN. That is what is suggested in your bill.

Mr. GOLDMAN. Yes.

The CHAIRMAN. Let's get specific. It is our understanding—I don't have all the facts here and neither does the Senator from New Hampshire—it is pretty generally understood that Resorts International, was seeking control of Pan American by controlling 9.7—I think that is the figure—of the stock. Whether or not they would get control with 9.7 percent it was apparently obvious to a great number of people, not only in management, but other people, that they were seeking control by getting at least up to 9.7 percent of the stock.

Why shouldn't the Board have authority—using 10 percent as a figure—to review under 10 percent at its own initiative if they want to? But not be required to.

You may find a situation where it is under 10 percent, but it would stick out like a sore thumb and you could use your own initiative to do it.

Mr. GOLDMAN. First, you have to test that suggestion in terms of the provisions of 408 and the draft bills which refer to prior approval.

It is very difficult to build in a discretionary power.

The CHAIRMAN. I understand that. You might be locking the barn door after the horse is gone.

Mr. GOLDMAN. Yes, sir; and the persons engaging in the securities transaction have to know whether they need prior approval or not. So I'm not sure how you could implement a discretionary power related to prior approval.

The CHAIRMAN. In this case the knowledge was so common, you might have taken your own initiative before the thing was actually done, or could be done. There would be, I would think, exceptions to the rule. And I suppose the Board's initiative would have to be spurred on by management coming in and being fearful of just what happened and giving you their views.

Mr. CROOKER. I don't think we are intent, as we stated before, on the 10 percent figure. We did think that there might be considerable logic behind picking a figure for approval somewhat higher than the figure required for the reporting of stockownership.

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I might comment that it appears from our records that two stockholders, CEDE & Co., and Kane & Co., own 12½ percent of Pan American stock. I would assume that these two stockownerships support present management. Whether a new stockholder coming in adverse to management, by acquisition of nine and a fraction percent could prevail against fairly sizable stockholders——

The CHAIRMAN. That would be something we would give the Board permission to look at.

I was just thinking out loud, trying to work out with what the Senator from New Hampshire is talking about. What would be true in one case, wouldn't be true in another case when it involves control, and the public interest.

Mr. CROOKER. Yes, sir.

Senator COTTON. I am still wondering if there isn't another safer and more reasonable approach to this problem. The chairman has referred to the Pan American Airlines situation. I haven't received any information about specific figures, and never discussed it with representatives of Pan American until after the bill was introduced.

Apparently the situation was brought to the attention of the executive branch and it desired action taken to plug up this loophole.

It is my understanding that the present management of Pan American controls only 2 or 3 percent of its stock.

The CHAIRMAN. I don't know the percentage.

Senator COTTON. Those figures may be wrong. Also, as you have quite aptly brought out, there possibly are other stockholders who could prevent a takeover. Nevertheless, the airline in question was very apprehensive that its management would be taken over.

Your responsibility and the public's responsibility, isn't to prevent investors from investing in such stock of airlines as they may see fit to buy. But, it is your responsibility to see that whoever owns the controlling stock provides management of the airline which is skilled and competent.

What is the test?

Mr. CROOKER. Fit, willing, and able.

Senator COTTON. Fit, willing, and able to do the job. That is the test, is it?

Mr. CROOKER. Yes, sir.

Senator COTTON. I am sure most would agree that no bill should be drafted to fit one particular case. It has to be addressed to a general principle.

If this bill provided for 5 percent instead of 10, it apparently would be effective in this particular instance. However, if it were 10 percent, it wouldn't be effective since it is my understanding that the stock held by Resorts International is more than 9 percent but less than 10 percent.

If this bill is passed with 10 percent, then you have no way of examining any transfer whatsoever, do you?

Mr. CROOKER. Senator, I might comment on this. If present management does have a very solid relationship with some of the existing major stockholders, and if our approval would be required before a new stockholder obtained an aggregate of more than 10 percent,

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present management might feel a little more comfortable even knowing that there is a stockholder here that has 9 and a fraction percent, but that they could not go over 10 percent in the aggregate without coming and seeking prior Board approval.

So that legislation in this area would be better than none. We concur completely with your statement that the legislation should not be tailored for any one case.

For example, in looking at what our records reveal on American Airlines, we don't find a report that any stockholder owns over 5 percent, and all of the directors and officers put together own less than one percent.

In a situation such as that, a stockholder, an acquirer might come in and buy 4 percent and seek to effectuate control. It is very difficult to know exactly what the percentage should be.

Senator COTTON. There should be a broadening so that you are not restricted in dealing with this situation only when one airline attempts to take over another, and these other areas of persons or corporations that are now in the law. It should be extended so that whatever may be the other activities of the holders of the stock, you may examine such activities and take that into consideration in determining whether they are fit, willing, and able to do the job. Right?

Mr. CROOKER. We completely support that purpose.

Senator COTTON. Is that concept incorporated in your suggested version of the bill?

Mr. CROOKER. We desire that purpose, so we hope that our bill would achieve that; yes, sir.

Senator COTTON. Under your suggested bill, can you inquire into the other activities and interests of the stockholders that proceed to designate the management of an airline, if their stock is under 10 percent?

Mr. CROOKER. No; not under 10 percent. And there is one other failing in any legislation that has been proposed. That is, if a company acquires the stock in an airline and is not engaged in any base operation that we feel is inimical to the national interests, but gets into other ventures after the acquisition, we might have disapproved the acquisition if the company had been engaged in such ventures at that time.

So, of course, this is another possibility that would not be covered by S. 1373 or by our proposal.

Senator COTTON. I have one other question. Your suggestion is predicated on the proposition that in order to prevent the management of airlines from falling into improper or unskilled hands, you be authorized to take action without hearing. Would that be in your power if the amount of stock held is in excess of 10 percent?

Mr. CROOKER. The point on the procedural shortcuts related to approval without a lengthy evidentiary hearing, where a cursory look at it would incline us to approve the transaction or grant an exemption. But the disapproval would come only after a hearing.

Senator COTTON. In the case of an aggrieved person or persons, where the approval is granted without a hearing, is there a chance of them coming in afterwards and securing a hearing by petitioning you to rescind that approval?

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Mr. CROOKER. May Mr. Goldman answer that, please?

Mr. GOLDMAN. I would say "No," Senator. Under the fourth proviso that would be added by our bill, the Board would have discretion to grant approval without a hearing, as in the case of other matters under the Board's jurisdiction. The Board would not grant approval without a hearing if there were adverse interests, or suggestions that there were serious problems.

Our bill, of course, assumes that there is certain confidence in the reasonable exercise of discretion that would be vested in the Board.

Senator COTTON. This is my last question. Do you seriously object to 5 percent instead of 10 percent?

Mr. CROOKER. No, sir.

Senator COTTON. You simply think that 10 is better?

Mr. CROOKER. No. Principally, Senator, that there should be some differential in the percentage between the reporting requirement and the prior approval requirement. It could be three and six, four and eight, three and five, four and seven. We just think that it seems a little illogical to say that they have to come and get prior approval to acquire the same amount, or the same percentage, of stocks as they would when the reporting requirement goes into effect.

I suppose in considering SEC percentages we were somewhat arbitrary in suggesting that 10-percent figure.

I don't think we are wedded to the 10-percent figure in any way. I just think that the prior approval figure should be a little higher than the figure in section 407 for the reporting of stockownership.

Senator COTTON. Shouldn't there be provision made so that when there is an ouster or there is about to be an ouster of the experienced management of an airline, with new management to be substituted, you be notified and have opportunity before the change is made to determine whether such new management is fit, willing and able to do the job?

Mr. CROOKER. Senator, there was some discussion that the Board study this. It was felt, I think, that as far as officers were concerned, the directors of the corporation should be in position to take management steps without requiring Board approval.

At one point, it was suggested that legislation might read that prior Board approval would not be required if the existing management approved the stock acquisition. The Board felt that was an undesirable provision because it would mean that whenever an entity, person or otherwise sought to acquire a particular percentage of stock in an airline, and that person was friendly to present management, the Board would have no discretion.

If by chance some potential acquirer thought that existing management was inept, or not making the most of the business possibilities of the carrier, then it would be more difficult for someone hositle to the existing management to acquire the crucial amount of stock, whatever it be.

So we rejected, at least preliminarily, the thought that the legislation should provide that we would have no such control if existing management of an air carrier approved the acquirer.

Senator COTTON. Committee counsel calls my attention to the fact that under our bill the 5-percent figure goes only to reporting and pre-

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sumption of control. But the bill still allows the CAB review of any control at any time by a noncarrier.

Is that your understanding of the bill?

Mr. CROOKER. It is our understanding of your bill; yes, sir.

Senator COTTON. Do you feel that this is a proper approach to extending your authority?

Mr. CROOKER. Senator, we don't feel it is an improper approach. We do feel that this would require the lengthy evidentiary hearing in every such instance to determine whether in fact it is control, and that more certainly in percentage might be more desirable in the balance than the uncertainty of what does constitute control.

Also, as I mentioned earlier, suppose an institution such as Resorts, International, comes in, if these were no 5-percent requirement, but merely a requirement for approval of control, we would want to show that 9.7 percent is not control.

I would think that the prima facie presumption could lead to protracted proceedings. We thought that possibly a flat percentage would be a slightly better approach to the problem.

Senator COTTON. Under this bill you certainly could issue what you might call a temporary restraining order without resorting to hearings, couldn't you?

Mr. CROOKER. I think——

Senator COTTON. That is, of course, if the amount involves over 5 percent.

Mr. CROOKER. We would, of course, build onto S. 1373 provisions for procedural shortcuts and exemption. We don't have to tie together the question of whether there is merely the word "control," or prima facie presumption that a certain percentage of stockownership is control, or whether you go to a flat percentage of stockownership.

We don't have to let that decision stand or fall with the things we have suggested for exemptions and procedural shortcuts.

Senator COTTON. Thank you, Mr. Chairman.

The CHAIRMAN. I want to reiterate what I said in the beginning, that I would be less than frank if I didn't suggest that the so-called *Resort* and *Pan American* case is one of the examples of why we are all going into this matter. This is not just a bill for that particular case. I know of two or three other moves that are at least contemplated against other airlines. We have specific examples of two or three more that are taking shape within the railroads. We are talking of the whole field of transportation. That is why we want the bill to apply to the whole picture, not just this one.

You mentioned that your bill wasn't retroactive to the date of introduction, as is this bill, which is March 7, 1969. Do you have any strong feelings about leaving that section in?

Mr. CROOKER. We have no feelings at all, strong or otherwise. We merely defer to the judgment of the committee.

The CHAIRMAN. The committee will have to decide that, if we get to the point where we are passing the bill out. It may not be necessary in these cases to go back to the date of introduction. We don't know. That is why we put it in, in case it was, in case it looked like the public interest made it necessary.

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It is not an unusual provision in bills. We have done it before where we have had the time element involved, as there is in this case.

Thank you all very much. We appreciate your coming.

Mr. Budge, you heard the opening statement. I think you have a statement to make on this. We would be glad to hear from you.

STATEMENT OF HON. HAMER H. BUDGE, CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION; ACCOMPANIED BY PHILLIP LOOMIS, GENERAL COUNSEL

Mr. BUDGE. Seated with me at the table is Mr. Phillip Loomis, who is the General Counsel of the Commission.

The CHAIRMAN. We are glad to have you here.

Mr. BUDGE. Before starting with my prepared text, Mr. Chairman, following on the colloquy which has just ensued, I might say that the proposal which is in the bill which you and Senator Cotton have introduced, is more in line with the theory of the actions which the Commission administers. Generally, it is reached in different ways.

Generally speaking, anything over 10 percent is presumed to be control, but the ultimate fact of control, remains to be a matter of evidence in the particular situation.

There are certainly many cases when control could be achieved at a fairly low percentage. In other cases 49 percent might not be control.

The CHAIRMAN. That is right.

Mr. BUDGE. Mr. Chairman and members of the committee, it is a pleasure to be here, particularly because the Securities and Exchange Commission rarely has the opportunity to testify before this committee. The committee is considering S. 1373, a bill which would, in effect, amend the Federal Aviation Act of 1958 so as to make it unlawful for any person to acquire control of any air carrier unless such acquisition is approved by the Civil Aeronautics Board.

Normally, legislation of this type is not within the responsibilities of the Commission. This legislation, however, does have a relationship to the current wave of corporate combinations and the rise of the so-called conglomerate corporations. I understand the committee would like some discussion of this movement and of the Commission's responsibilities with respect to it, together with any aspects of it which are a source of concern to the Commission. I understand also that you wish any views I may have with respect to S. 1373.

First, with respect to the Commission's jurisdiction in general and insofar as relevant to the subject of today's discussion, the Commission's primary responsibilities are three: First, to provide disclosure of material business and financial information with respect to securities being offered to the public and with respect to securities publicly traded in the markets. Disclosure with respect to new issues is provided by registration statements and prospectuses under the Securities Act of 1933 and disclosure with respect to publicly traded securities is provided by registration and reporting by the companies under the Securities Exchange Act of 1934. Second, the Commission seeks to detect and prevent fraud, deception, and manipulation in the securities markets. Third, the Commission is responsible for regulation of the markets and of the brokers and dealers doing business in them.

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In this aspect of our work there is a rather unique scheme of self-regulation. The exchanges are made responsible by law to regulate the conduct of their members and to enforce, as to their members, the provisions of the Securities Exchange Act of 1934.

In the over-the-counter market, the National Association of Securities Dealers has a similar responsibility. This is not a trade association, as it name might indicate, but rather is an association comprising most of the broker-dealers who do business in the over-the-counter market or who underwrite new issues. It was created pursuant to the so-called Maloney Act, adopted by Congress in 1938, for the purpose of providing a self-regulatory body in the over-the-counter market with statutory responsibilities comparable to those given the exchanges. The Commission is required by these statutes to exercise continuous oversight over the activities of the self-regulatory agencies to see that they do the job which Congress entrusted to them.

The rules of both the exchanges and the association are subject to review by the commission. The object of this regulatory pattern is to enlist the best efforts of both the industry and the commission to seek adherence on the part of the industry to just and equitable principles of trade, to prevent fraud and manipulation, and to maintain fair and orderly markets. Except in the limited area of public utility holding companies, the commission ordinarily has no authority either to approve or disapprove a corporation acquisition or to indicate a view as to its merits.

Turning now specifically to our jurisdiction with respect to corporate combinations, where a person seeks to take over another company by offering its securities in exchange for outstanding securities of the so-called target company, the company seeking the takeover will be required to register the securities to be offered with the Commission under the Securities Act.

When the transaction involves a vote of stockholders, either because a merger is proposed or because changes in the corporate structure or capitalization are necessary in order to consummate the transaction, the company seeking such a vote will, in almost every case, have to furnish its stockholders with a proxy statement. This statement is designed to provide the stockholders with the information necessary to permit them to cast an informed vote. While we review such statements in an effort to see that they are accurate and adequate, we are not permitted to pass upon the merits of the proposal on which the shareholders are asked to vote.

Our responsibilities with respect to takeover efforts were recently increased when Congress enacted Public Law 90–439, effective July 29, 1968. This legislation provides that any party who acquires 10 percent of any class of equity securities registered under the Securities Exchange Act of 1934, or who makes a tender offer for such securities involving at least 10 percent, must provide certain disclosures concerning itself and its intentions. It also prohibits fraudulent, deceptive, and manipulative practices in connection with tender offers and contains substantive requirements concerning the terms of such offers. In addition, it provides for regulation by the Commission of solicitations of shareholders in favor of, and in opposition to, a tender offer. It is important to note that takeover efforts through an exchange of securities

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rather than through a cash offer, are exempted from most of its provisions.

Recent years have seen a substantial acceleration in corporate acquisitions. A representative of the Federal Trade Commission presented striking testimony with respect to this trend before the House Committee on Ways and Means last week. He pointed out that the total number of manufacturing and mining mergers in 1968 reached 2,442, which was 12 times the 1950 level, three times the 1960 level, and 1½ times the level of 1967, which was the previous peak year. He also pointed out an increasing tendency for acquisitions to involve large corporations, which were defined as those having assets of $10 million or more. Corporations of this size group are a particularly significant factor in our economy.

While there are over 180,000 corporations engaged in manufacturing and mining, a relatively small group, 2,500, with assets of over $10 million have more than 80 percent of all corporate manufacturing assets and profits. In 1968, at least 192 large corporations, as so defined, were acquired. Over the period from 1948 through 1968, large manufacturing and mining corporations with combined assets of $52 billion were acquired. Over one-half of these assets were acquired in the last 4 years of this 21-year period.

When very large corporations are considered, the trend is even more striking. Over the entire 19-year period from 1948 to 1966, only five companies with assets exceeding $250 million were acquired. In 1967, there were six such acquisitions and in 1968 there were 12. Thus, more very large acquisitions occurred in 1968 than during the entire 20 preceding years.

The Commission's files contain certain further data. In 1968, a total of over $11,220 million of securities were registered with the Commission for the purpose of exchange for the securities of other companies. Our staff has analyzed 54 cash tender offers, information with respect to which was filed with the Commission pursuant to Public Law 90–439. During the period from the effective date of that bill to February 28, 1969, these 54 cash tender offers involved a total offering price of over $1,423 million. Of this amount, the lion's share or $1,135 million was financed by bank loans and another $97 million by prior sale of securities.

The CHAIRMAN. Mr. Chairman, by that you mean—so that the record will be clear—one company or a group will offer so much per share of stock. Is that what you call a tender?

Mr. BUDGE. There are two figures. The first is $11,220 million, that was registration of securities to be used in exchange for the securities of the so-called private company.

That is the $11 billion figure. The other figure is a cash tender offer where cash is offered.

The CHAIRMAN. By cash tender, organization A, or company A will say to company B, to the stockholders, we will pay you so much per share for your stock to take over the company?

Mr. BUDGE. Yes, that is correct.

The CHAIRMAN. But you would have no control if they took that money that they offered as a tender and went into the market and started to buy stock and assume control?

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Mr. BUDGE. No, sir, except under the so-called Williams bill, the bill to which I referred effective July 1, 1968, that requires reporting at the time they reached 10 percent in their acquisition.

The CHAIRMAN. What if you found fraud in the offer? You could move in then on the acquisition of stock, couldn't you?

Mr. BUDGE. If there is stock, we can.

The CHAIRMAN. That would have to be proven. So there are three ways—I am a layman—that one company can take over control of another: One is to start buying stock to get control.

Mr. BUDGE. Yes, sir.

The CHAIRMAN. The other is to offer a cash tender.

Mr. BUDGE. Yes, sir.

The CHAIRMAN. And the third is to offer a merger in an exchange of stock between the two companies.

Mr. BUDGE. The third one should be expanded to include the situation which is this $11,220 million figure where the tender offer is for security. That is where the big growth has occurred, the $11 billion figure, for securities in the tender offer, versus the $1 billion figure for cash tender offers.

The CHAIRMAN. The cash tender is used more by people that do not have securities to exchange than going into the market because going into the market keeps moving up the price of stock, whereas the tender is a flat tender to the stockholders.

Mr. BUDGE. Yes, sir.

The CHAIRMAN. By one corporation to another?

Mr. BUDGE. Yes, sir.

The CHAIRMAN. Or sometimes, as I have read, there is an exchange of stock certificates plus a cash tender.

Mr. BUDGE. Yes, sir. There are various kinds of combinations.

The CHAIRMAN. Thank you.

Mr. BUDGE. With respect to exchange offers, there has been a marked trend away from exchange offers on a stock-for-stock basis to ones in which debt securities are offered. Analysis of the registrations which were filed with us for exchange offers of securities shows that in 1966 almost 90 percent of such filings were for common stock. In 1968, the corresponding figure was only 40 percent.

It seems to me there are two major factors which have a good deal to do with the rapid increase in corporate combinations. The first is the increased use of corporate takeovers, where a company acquires another by appealing, often over the head of the management, to the security holders of the so-called target company by offering them either cash or a package of securities in exchange for the securities of the target company. This, of course, is to be contrasted with the more traditional merger which is negotiated on terms mutually acceptable to the parties. The second factor is the rise of the "conglomerate corporation." The term apparently originated in the classification of acquisitions under the antitrust laws but has now become a part of our general vocabulary. It refers generally to a company which is engaged in two or more lines of business which are entirely unrelated, such as shoe manufacturing and the steel business.

Until comparatively recently, most mergers and acquisitions involved companies which were either in the same line of business or

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in related lines of businesses. The conglomerate, however, is not so limited. The corporate takeover and the conglomerate corporation in combination greatly increase the opportunities for corporate acquisitions. By the use of the takeover, a company can consummate an acquisition whether the management of the target company likes it or not. Furthermore, acquisitions by a company of another company in the same business or in a related business have been rather strictly limited by the antitrust laws. Although the situation may well change, as indicated in testimony before the House Ways and Means Committee last week by Assistant Attorney General McLaren, up to now the antitrust laws have not significantly limited acquisitions of wholly unrelated businesses by a purely conglomerate corporation.

Senator COTTON. May I interrupt you at that point?

Mr. BUDGE. Yes, Senator.

Senator COTTON. Are you saying in essence that enforcement of the Sherman Anti-Trust Act and the Clayton Act, preventing two or more companies in the same line of business from merging—like water from a dam upstream which seeks to find another way out—has encouraged an increase in conglomerates composed of unrelated businesses reaching out to secure more and more control? Is that a correct statement?

Mr. BUDGE. I would hesitate to speculate as to the cause.

Senator COTTON. I am not suggesting that we cease enforcing antimonopoly and antitrust laws. I am just speculating on whether the matter of enforcement has some influence upon conglomerate activities.

Mr. BUDGE. Today the antitrust laws, as you have indicated, tend to prevent the accumulation on the vertical, so to speak, basis, but not on a horizontal basis. If you stay within the same industry, the antitrust laws affect you. If you do not, you are not affected by the antitrust laws. Up until recently anyway.

Senator COTTON. Pardon my interruption.

Mr. BUDGE. Both the takeover technique and the conglomerate corporation are somewhat controversial. The takeover effort is viewed by some as an instrument by which corporate raiders may swallow up important and useful companies. On the other hand, it is defended as perhaps the only effective way in which an entrenched but inept management may be dislodged. Similarly, conglomerate corporations are regarded by some as an unhealthy development leading to undue concentration of control over the economy and as creating complex organizations, with equally complex, and perhaps unsound, capital structures. It is contended that such organizations are difficult to manage effectively and likely to be vulnerable in the event of an economic downturn. On the other hand, they are defended as a means by which economic resources can be more effectively deployed and acquired companies can obtain resources and support which will enable them to develop their full potential as contributors to our economy.

I do not have the answer to this debate; I suspect that some takeovers and some conglomerates are desirable and useful and that some are not. One thing I think, however, is reasonably clear. The takeover movement and the rise of the conglomerate corporation carry with them a potential for a rather fundamental change in the structure of American industry. As such, these matters certainly merit the attention of the Congress.

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The CHAIRMAN. I might say right here, that what we are talking about here is the matter of transportation, which requires certificates of public convenience and necessity and operation in the public interest.

Suppose a company took over an airline and that was not their biggest business, or a small railroad, in our country, where we have small railroads, and something happens, and they needed to get together and consolidate their position because of some financial trouble. They are apt to leave the railroad at the tailend, the orphan, and the public would be hurt, and the stockholders might be hurt. We are talking of what is in the public interest.

This is of great concern to you people. How far do you go in the corporate interest, with conglomerates, and when does it become necessary?

Mr. BUDGE. Yes, sir.

As you indicated, Mr. Chairman, the nature of the industry, such as the ones we are discussing here——

The CHAIRMAN. I should have used the words "the nature of the industry," particularly where there is a public license involved.

Mr. BUDGE. Yes, sir.

Irrespective of fundamental economic and social issues, there are certain aspects of the takeover movement and the conglomerate corporation which are a source of concern to the Commission.

Until the last 3 or 4 years, the acquisition and merger movement, although extremely important from the standpoint of economic concentration of business and markets and from the standpoint of overall competition, did not carry with it or have associated strong financial implications. In the last 3 or 4 years and particularly this last year, more and more the basic reason for the merger or combination seems to be essentially a financial reason. That is, companies are buying other companies or merging with other companies because there are substantial immediate financial advantages to the surviving company in terms of increases in per-share earnings, and in terms of the liquid assets which can be obtained by acquiring other companies.

The CHAIRMAN. Is that what we called the cash flow here this morning?

Mr. BUDGE. The chairman previously referred to that; yes, sir.

The CHAIRMAN. Go ahead.

Mr. BUDGE. The tendency of the market to give a generous times-earnings appraisal to certain stocks has an additional consequence in encouraging combinations. Let me illustrate by a hypothetical and somewhat oversimplified example. Assume that the acquiring company has become a glamor company so that its stock sells at a high multiple of earnings. An ideal target for acquisition by this glamor company may be a conservatively capitalized company which has had relatively slow earnings growth so that its stock sells at a low multiple of earnings. For purposes of illustration let us assume that total earnings of each of the two companies are about equal and that each is earning $1 per share but the common stock of the acquiring company sells at 30 times earnings which the common stock of the target company sells at 15 times earnings. If the acquiring company can engineer a takeover by exchanging stock on the basis of market value—that is,

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one of its shares for each two shares of the target company—the total earnings of the combination are twice that of the acquirer while the total outstanding shares have only increased 50 percent. In consequence, after the combination, its own earnings per share (restated historically for the same period) jump from $1 per share to $1.33 per share.

The techniques for accomplishing corporate takeovers have become increasingly sophisticated and I believe they are changing rather rapidly. I understand that at present a company planning an acquisition will select as a target a company whose shares are selling at a lower price earnings ratio, perhaps because it is not regarded as a glamour company and has not caught the fancy of investors and speculators in today's markets. Before announcing its acquisition proposal, the acquiring company will quietly accumulate shares of the target company by purchases in the market—and this is to what the chairman referred a few minutes ago—and may also inform certain aggressive institutional investors of its intentions. These institutions, in turn, will then buy securities not only of the target company but also of the acquiring company, since they contemplate that if the acquisition is successful, the earnings per share of the acquiring company will increase due to the phenomena that I described earlier. While the proposed acquiring company will usually not buy as much as 10 percent of the target since this would necessitate a filing with the Commission under Public Law 90–439 and consequent disclosure of its purposes and intentions, it may nevertheless succeed, through interesting others, in placing in its own hands and in so-called friendly hands up to 25 or 30 percent of the stock of the target company before the proposed acquisition is announced. The effect of this purchasing is likely to cause the securities of both the target company and the acquiring company to rise significantly in price even before the proposed acquisition is announced.

Takeovers have an impact in other ways due principally to the fact that the average public investor does not fully understand the complicated package being offered when a tender offer is made.

Senator COTTON. You have said a mouthful. You have convinced me by your example that any of us laymen who buy a share of stock is a gambler, because we couldn't possibly know of such techniques or their effects.

Mr. BUDGE. I would hate to use the entire securities market in that statement. [Laughter.]

Senator COTTON. You would not include the entire Congress.

Mr. BUDGE. No, sir. We do the best we can to get disclosure so that the investor can know everything that we can find out about the company, so that he can make an informed decision. Congress said, "He is to make the decision and not the Commission."

Senator COTTON. I was not suggesting that your Commission is not doing its full duty.

Mr. BUDGE. Thank you, Senator.

With respect to some conglomerate corporations, we have been concerned by the extremely complex capital structures which are often created. In addition, we have felt that improvements are needed in accounting practices as applied to conglomerates in order to provide more meaningful information for investors and the securities markets.

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Today a typical exchange offer might consist of a proposal to issue a package of securities consisting of:

(1) $45 principal amount of subordinated debentures bearing interest at a specified rate,

(2) three-fifths of one share of preferred stock, and

(3) three-tenths of a warrant, expiring in 5 years, to purchase one share of common stock at a specified price;

all in exchange for two shares of common stock of a specified issue, which would be the target company. It may be difficult for a shareholder who receives such an offer to evaluate the package by reason of the uncertainties involved in valuing subordinated debt or preferred stock for which the market has not been established, and for which no existing issue can be used for comparison. It is likewise difficult to value a right to purchase shares in a future period. In addition, there is the typical problem of inconvenient fractions.

These aspects of takeovers and conglomerate corporations have made it increasingly difficult for the Commission to obtain disclosure which is meaningful to the average investor. Prospectuses and proxy statements of a conglomerate corporation planning a takeover are often extremely complex douments, not because we want it that way but because what is being described is inherently complex.

Where, as is quite often the case, two or more corporations are seeking to acquire the target company and the management of that company is resisting one or both of these suitors by every means available to it, the situation becomes even more complicated. Claims and counterclaims, charges and countercharges, are hurled back and forth by all concerned and each side accuses the other of unethical or unlawful tactics. It thus becomes much more difficult for us to prevent investors from being misled.

I might say, incidentally, that not only the takeover itself but also certain of the defensive tactics of management raise problems as a matter of public policy; for example, corporate charters may be amended to restrict voting rights of shareholders in order to abort the takeover; and defensive mergers may be negotiated hastily and, in some instances, without adequate consideration of their business and economic merits.

Takeover efforts are, as I have mentioned, accompanied by very active trading in the securities of the companies involved. There is not only the accumulation prior to the offer which I referred to, but during the period of the offer, or while a registration statement with respect to the offer is on file with the Commission but not yet effective, speculators and arbitragers trade actively in the securities involved.

Even if the takeover bid is unsuccessful, the would-be takeover parties may end up with a substantial profit. Although we do not have specific figures in this area, we are aware of a number of instances in which unsuccessful tender offers have led to profits of many millions of dollars when the unsuccessful party has resold in a market which has been affected by both its efforts and the efforts of those who have successfully resisted its attempt to take over.

All this activity contributes to the tremendous increase in volume of trading on the securities exchanges and in the over-the-counter

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market which has occurred recently. Shortly after I joined the Commission in 1964, the New York Stock Exchange reported that the exchange estimated that by 1975 there might be occasions when as many as 10 million shares would be traded on the exchange in a single day. As you know, 10-million-share days are now routine and some days have been well over twice that figure. This unexpected increase in volume in trading has presented us with a serious problem. Many firms in the securities industry have not been equipped to handle the volume of business which came to them, and as a result they have fallen behind in their bookkeeping and in the delivery of shares which have been sold from the seller's broker to the buyer's broker. In some instances we have found firms whose records were in such a condition that they did not know where they really stood.

The Commission and the self-regulatory agencies are bending every effort to remedy this situation, but I think the final solution will be some time in coming. Takeover efforts and conglomerates of course are not responsible for this situation. It is more the product of a substantial increase in speculative activity not only by individual investors but also by certain institutions such as the so-called go-go mutual funds and the hedge funds.

Finally, I understand that you wish me to express any views that the Commission may have with respect to S. 1373.

The Commission has no real acquaintance with the regulatory pattern for the carrier industry, which was created by the Federal Aviation Act, and consequently we are not in a position to express any informed judgment as to whether enactment of S. 1373 is necessary or appropriate to prevent disruption or impairment of the regulatory scheme. On the face of things, however, it would appear to us to be in the public interest that the Civil Aeronautics Board should have an opportunity to take a look at a proposed acquisition of an air carrier—and I might add so far as I know the members of the Commission feel that that should be expanded as has been suggested in the discussion here this morning, Mr. Chairman—in order to determine, for example, whether or not this would create relationships which are not in the public interest or whether the acquisition would impose upon the carrier a capital structure which would interfere with its efficient and economical operation. We have encountered questions of this sort in our administration of the Public Utility Holding Company Act of 1935, where our prior approval is required for certain acquisitions by a holding company. This type of legislation seems to us entirely appropriate, particularly in view of the fact the air carrier industry has associated with it important national defense implications. And I would include other areas of transportation in that statement, Mr. Chairman.

This concludes my prepared statement. We, of course, stand ready to attempt to develop any further information which you feel may be helpful to you.

The CHAIRMAN. The chairman appreciates very much this fine statement.

I think members of the committee will keep this statement of yours in case they have to advise anybody about investments. They should read this first.

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I am very pleased that you brought out the parallel in the end between what we are talking about, particularly in the certificated transportation industry, with the same type of public interest as is involved in public utilities.

Mr. BUDGE. Certainly there is some similarity.

The CHAIRMAN. There is ample precedent. The 1935 act did just that, I think, to give the authority, and when you are dealing with the public interest, in public utilities, which have somewhat similar relationships.

Mr. BUDGE. I know that it is true, Mr. Chairman.

The CHAIRMAN. Senator Cotton.

Senator COTTON. Is it present marketing procedure, under present law, and under the supervision of your Commission, for Mr. A to buy stock, other than over the counter, in a corporation from Mr. B, and then hold it without registering the transaction on the company's records, and by proxy or otherwise vote it or conceal ownership of such stock?

Mr. BUDGE. Yes, sir. And I am sure that occurs very, very frequently.

Senator COTTON. Even in sizable corporations?

Mr. BUDGE. In sizable corporations and in sizable blocks of stock.

Senator COTTON. Isn't that somewhat of a menace to what we are trying to do to protect the traveling public and to see that airlines and other regulated modes of transportation are under efficient and able management?

Mr. BUDGE. I would think that the reporting requirements which were suggested here this morning by the previous witness would go far toward correcting that situation.

Senator COTTON. Looking at it from the standpoint of the Securities and Exchange Commission—this could be an off-the-cuff answer which you may not be prepared to make—isn't there some way of preventing this practice? I can't see much good or harm in the practice of having concealed ownership or control of a corporation.

Mr. BUDGE. Yes. I think the direction is in that way, because of the very popular use of street name in holding securities. I wouldn't want to express an opinion on that, Senator. There are a great many institutions who would be involved in that. I would have to explore further before I feel it proper to comment on that.

Senator COTTON. Are you now referring to perfectly respectable institutions like holding companies, banks, mutual funds and so on? Is that what you mean?

Mr. BUDGE. I was talking about the holding in street names primarily for individuals. Of course, so many of our institutions now—I mean banks, trust funds, insurance companies, pension funds and mutual funds——

Senator COTTON. They don't conceal their ownership.

Mr. BUDGE. No, not in name.

Mr. LOOMIS. It is a common practice particularly for banks to hold securities in the name of a nominee, and individual person who is just a nominee, and nothing more. The bank doesn't hold in its own name.

Senator COTTON. He is a strawman?

Mr. LOOMIS. Yes.

Senator COTTON. Thank you.

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The CHAIRMAN. Senator Baker.

Senator BAKER. I have no questions.

The CHAIRMAN. We thank you very much. We appreciate your contribution.

Mr. BUDGE. Thank you, Mr. Chairman.

The CHAIRMAN. The committee will resume at 9:30 on this subject Thursday, when we will hear from industry witnesses, and maybe one or two Government witnesses.

(Whereupon, at 12:12 p.m., the committee adjourned, to reconvene on Thursday, March 20, 1969.)

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TO AMEND THE FEDERAL AVIATION ACT OF 1958

THURSDAY, MARCH 20, 1969

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee met at 9:35 a.m., in room 6202, New Senate Office Building, the Honorable Warren G. Magnuson (chairman of the committee), presiding.

Present: Senators Magnuson, Cannon, Cotton, Pearson, and Hansen.

The CHAIRMAN. The committee will come to order.

This is a continuation of hearings on S. 1373 which amends the Federal Aviation Act to broaden the authority of the CAB to review the acquisition of air carriers by nonair carriers.

We heard Tuesday from the Chairman of the CAB and the Chairman of the Securities Exchange Commission and we are anxious to get the view now of the Department of Transportation.

Mr. Cherington is here and he has a short statement. We would be glad to hear from you at this time.

STATEMENT OF PAUL WHITON CHERINGTON, ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF TRANSPORTATION, WASHINGTON, D.C.; ACCOMPANIED BY THOMAS TIDD, ASSISTANT GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION, WASHINGTON, D.C.

Mr. CHERINGTON. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee:

I am Paul W. Cherington and I have with me Thomas Tidd, Assistant General Counsel of the Department on my left.

I appreciate this opportunity to appear before you today to discuss the problem of acquisition of airline control. Section 408 of the Federal Aviation Act presently prohibits the acquisition of control of an air carrier by other common carriers or persons engaged in other phases of aeronautics without the approval of the Civil Aeronautics Board.

The increasing popularity of conglomerate mergers which we have witnessed in the past few years has introduced a new factor not contemplated by section 408. This is the possibility that acquisition of control of an air carrier might be contrary to the public interest because of improper financial manipulation or the involvement of foreign interests.

In dealing with this new development, we ought to be clear and precise as to the issue involved. That issue is not whether conglomerates per se are good or bad or whether control of an airline by a

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conglomerate is good or bad. The question, rather, is this: How and to what extent should the acquisition of control of an airline be regulated so as to assure that its operations are fully consistent with and contribute to the effectiveness and efficiency of the nation's air transportation system, the postal service, and the national defense? The Department of Transportation believes that the resolution of this important public issue can best be made by providing the Civil Aeronautics Board with the authority and responsibility to assess, on a case-by-case basis, acquisitions of air carrier control, provided that the Board's scope of review is appropriately limited.

S. 1373 would make it unlawful for any person to acquire control of an air carrier without the approval of the Civil Aeronautics Board. The beneficial ownership of 5 percent or more of the capital stock or capital of an air carrier would be deemed to constitute control unless the Board found otherwise.

In his testimony last Tuesday, Chairman Crooker, speaking for the Aeronautics Board, proposed an alternative approach. The bill recommended by the Board would make it unlawful for any person, without the approval of the Board, to acquire 10 percent or more of any class of the capital stock or capital of an air carrier or for any person holding 10 percent to increase his holdings by 5 percent or more.

The Board bill would also permit the Board to exempt certain acquisitions and expedite the issuance of its order in appropriate circumstances.

There are three questions that must be confronted in any legislation to be reported by this committee dealing with this general problem. First, how is the question of "control" to be defined and at what point should the acquisition of stock in an air carrier be presumed to constitute "control"? Second, what should be the Board's scope of review in reviewing a proposed acquisition of control in an air carrier? Put differently, what standards should the Board be authorized to use in making a judgment whether or not to approve the proposed stock purchase? Third, how should the relevant antitrust considerations be considered. Let me briefly take up each of these questions in turn.

(1) S. 1373 properly, in our judgment, makes the question of "control" the central issue to be considered by the Board. This, we feel, is the principal subject of attention. If, as a matter of fact in an individual case, the person proposing to acquire stock in an air carrier will, as a result, gain control, the Board should have a full opportunity to assess the effects on air transportation. When such "control" is acquired will necessarily depend on the facts and thus it should be treated as it is in S. 1373. There is, though, the additional point: At what point should there be a presumption of control? We would suggest the use of a 10-percent standard rather than the 5-percent standard used in S. 1373. This would seem to be a somewhat more realistic threshold and it would not preclude the Board from determining, in a given instance, that control had been gained with a smaller percentage of stock ownership.

Senator COTTON. Would the witness object to being interrupted for a second?

Are you referring now to any part of the bill such as line 4, page 2? It is not quite clear to me. If you fix 5 percent or 10 percent in the bill,

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what authority will the Board have to conclude that control had been acquired by a lesser amount?

Mr. CHERINGTON. Well, we feel, Senator, that if the facts so indicate, a percentage of control below the threshold may in fact constitute control. The Board could then so find. But the threshold would be presumptive evidence of control.

Senator COTTON. That would have to be written into the bill so as to make it clear. It is not clear in the bill now, is it? I note line 4, page 2——

Senator CANNON. It is covered in line 10, page 2, and it simply provides for presumption of control. That section starting with line 10 provides for presumption of control with 5 percent. The witness is saying that presumption should be at 10 percent which would mean the Board would still have the authority to examine on a case-by-case basis below that but would not be confronted with a statutory presumption of below 10 percent.

Mr. CHERINGTON. Yes, sir, that is the way we read the bill except we would favor changing the 5 to 10 percent.

The CHAIRMAN. As I recall it, we asked the question well below that, supposing it is 3 or 4 percent might happen, which is possible, the Board on its own initiative could pick up the case.

Mr. CHERINGTON. That is correct.

Senator COTTON. Under the provision referred to by Senator Cannon, I think it makes little difference whether you have the presumption at 5 percent or 10 percent or 15 percent if the Board has authority to go ahead and deal with the case where a lesser amount actually constitutes control. I think that should be crystal clear in the bill and I am not sure that even part of the bill referred to by Senator Cannon makes that stand out clearly.

Do you think it is clear in the bill that the Board could act on lesser percentages?

Mr. CHERINGTON. Well, we so read it. I think perhaps that could be strengthened or clarified.

Senator COTTON. I won't delay you further.

The CHAIRMAN. I think we are all in agreement we should clear that up if the language is not clear.

Mr. CHERINGTON. (2) A nonair carrier's acquisition of control of an air carrier, particularly where the acquirer may be denominated a "conglomerate," can raise a great many questions bout the effect on air transportation. It would be a mistake, in our judgment, however, to authorize or encourage the Board to engage in a boundless search for evidence relating to every conceivable pro or con that might be involved. Such an expansive inquiry could be used by the management of the to-be-acquired carrier to perpetuate its control, without regard to the likely actual effects on the carrier's transportation operations. In any event, it could lead to lengthy delays in the resolution of particular cases.

In considering the acquistion's consistency with the public interest the Board should not attempt to weigh all the imponderables associated with the acquirer's anticipated management of the carrier but should confine its review narrowly to the purchaser's capacity to fulfill the responsibilities imposed by the applicable certificates of public

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convenience and necessity. Beyond this determination, only two substantive issues appropriately warrant scrutiny: the effect of the acquisition on competition in air transportation and foreign control. We would urge this committee to make clear in any report on S. 1373 that it anticipates that the Board will interpret the legislation narrowly along these lines rather than expansively.

3. Any acquisition of control of one company by another may conceivably lessen competition. This is no less true when the acquirer is a conglomerate organization for when the acquired firm is an air carrier than in any other situation. In recent weeks the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice has spoken publicly about the economic implications of conglomerate mergers. The problem with which S. 1373 deals must be considered in the larger context of our overall national antitrust policy. In examining S. 1373 we have concluded that by authorizing the Board to approve acquisitions of air carriers by noncarriers the bill may have the effect of immunizing such transactions from the operation of the antitrust laws. This presents serious risk of unintended legal consequences, and we feel that consideration should be given to changes in the measure so that it would not have the consequence of sheltering the parties from the antitrust laws. For fuller development of this point we would, of course, defer to the opinion of the Department of Justice.

In summary, we recommend that the provision in S. 1373 which prohibits the acquisition of control by an air carrier without Board approval be retained, that the point of presumptive control be raised to 10 percent, that the Board be granted the discretion it seeks with respect to granting exemptions and simplifying procedures, and that the area of the Board's inquiry be clearly delineated by the committee.

That concludes my prepared statement.

The CHAIRMAN. Mr. Secretary, there is a matter that you didn't touch on, and rightly so, but it involves this whole matter.

The bill, as now drafted, would apply to any carrier, whether it's scheduled or nonscheduled.

Mr. CHERINGTON. Yes, sir.

The CHAIRMAN. Any carrier that would get an FAA license to fly could be a small line—an air taxi or a carrier of that kind. Now, some of these airlines have made some efforts to be conglomerate in a certain extent. I don't think it has been serious. Usually something connected with their operation. It wouldn't necessarily be carrying a passenger. Something directly or indirectly connected.

Now, if they can do that, I think you pointed out that there may be some problems involving noncarrier conglomerates to get into this field without the Board's approval?

Mr. CHERINGTON. Yes, sir.

The CHAIRMAN. I think the difference is that we are dealing with people experienced in the air transportation business, even though they may have wanted to get into a company they are directly connected with.

I know many air carriers that are associated directly or indirectly with hotels along their route to better accommodate passengers. I think what you point out, in the report we should take a good long

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look at this side of it. Do you have any feeling about the legislation applying to all carriers, whether they are scheduled or nonscheduled?

Mr. CHERINGTON. I must say, Mr. Chairman, that I think in considering this bill we were thinking in term of certificated carriers. I don't think we focused on whether they were scheduled or nonscheduled.

On the other hand, I don't think we contemplated the air taxis and that——

The CHAIRMAN. I could conceive of a situation where it might be desirable and I think the Board would approve of it, where an air cargo—specific air cargo line—may want to get a trucking company to get their goods there.

Mr. CHERINGTON. Yes.

The CHAIRMAN. It's directly connected, but it's still a trucking company, but it might be in the best interests of the aircargo line, and of the public it serves.

I think we have to take that into consideration too. This is why we would put it across the board. But as you suggest, and the Board suggests, if you don't put them into endless discussions with things of that kind, why, it's probably in the best interests of the whole air carrier business.

Mr. CHERINGTON. I think that is correct. As I say, I don't think we focused on this, but I wouldn't object if this were confined to certificated air carriers.

The CHAIRMAN. Now, you have some responsibility down in the Department of Transportation for all forms of transportation. Although this bill only applies to air carriers, there are similar situations involving surface transportation and there may be in merchant marine.

So the Department does have a concern. I hope it goes beyond just air carriers.

Mr. CHERINGTON. It certainly does, and we——

The CHAIRMAN. Railroads, trunklines.

Mr. CHERINGTON. And particularly, I think more recently in the merchant marine field where there has been quite a movement in this direction.

The CHAIRMAN. There are some of these problems in the merchant marine field too, so this is only one facet of the whole problem.

Mr. CHERINGTON. Yes, sir.

The CHAIRMAN. Senator Cotton?

Senator COTTON. I only wanted to pursue very briefly my former question. Are you definitely of the opinion that a certain percentage for presumptive control is desirable in the bill?

Mr. CHERINGTON. I would guess that on balance, it was in the way of providing some guidelines, some indication of the intent of Congress as to where the Board should definitely look, provided the Board is permitted to look below the threshold where the particular facts justify it.

I guess that I would say that a threshold number was desirable.

Senator COTTON. Expressed in very plain, ordinary English, isn't it a fact that the purpose of the bill it to authorize the CAB, either acting on its own volition, or in response to a complaint by the stockholders or the officers or the users of any airline, to require its prior ap-

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proval and second, to require the CAB to investigate and determine whether control is being secured and if so whether it's desirable in the public interest subject, of course, to the limitation that such shall not affect antitrust laws relating to monopolies?

Isn't that it in plain, ordinary English? I haven't expressed it very succinctly, but that is the purpose of the bill, isn't it?

Mr. CHERINGTON. Yes, sir.

Senator COTTON. Perhaps it should be expressed somewhat in that manner. It seems to me a little artificial to say that, No. 1, in the public interest the CAB shall have its eye on and may move either with or without complaint to determine the fitness of the control of a certificated airline, and No. 2, that 5 percent or 10 percent or 12 percent or 8 percent shall be presumptive indication that such control is being gained.

As the Chairman said the day before yesterday, there are cases and cases where it would require 30 or 40 percent to gain control and others where 2 or 3 percent would have the same effect.

I wonder if the bill couldn't be simplified. What is your opinion on that or the opinion of counsel?

Mr. CHERINGTON. Well, I think it might be. On the other hand, the threshold, I believe, tends to throw the burden perhaps on the acquirer to prove that he doesn't have control and this may be a desirable feature.

Senator COTTON. Thank you.

The CHAIRMAN. Too, there may be times when the Board may deem—if there is a presumption of control—that it might be in the public interest to allow this control.

There could be those cases, too.

Mr. CHERINGTON. Oh, yes.

The CHAIRMAN. And it may be that new management might be in the best interest of the public and everyone else in a certain case.

It should be on a case-by-case basis.

Senator COTTON. My question assumed that. It's a case of when they shall examine it. We also are concerned that this bill not be abused to lock in every existing management.

The CHAIRMAN. I don't think we could, and I don't think we ought to. But we ought to have—the Board ought to have discretion in the public interest to take a look at these things.

Now, the FCC could take a look at these things when it comes to a license for the TV and radio, when the license comes up for renewal, they can call in anyone who may have acquired a portion of it during the 3-year period, or is attempting to acquire, and decide whether or not they shall renew the license, if this is in the public interest or not.

They do it all the time. They consider the quality of the people involved, and whether they are fit, willing, and able, and it may be that the ICC and CAB should have similar authority in the public interest.

Mr. CHERINGTON. Well, of course the Board, as Chairman Crooker pointed out Tuesday, does do this when it issues the license originally, so this is simply bringing it up and keeping it up to date in many ways.

The CHAIRMAN. And the Federal Power Commission takes a good long look at the economics of who runs the public utilities companies, because they are to be operated in the public interest.

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So there is nothing new about this, precedentwise. It may be a little more difficult a field to deal in with air carriers, but there is nothing new about it as far as the Government is concerned.

Senator Cannon?

Senator CANNON. Thank you. Mr. Secretary, as I understand it, you would agree with the provision that says that any person owning more than 5 percent should submit annually or at such time as the Board may require, a description of the shares of stock and so on.

You would leave that at 5 percent, which would require filing with the Board, then, insofar as the presumption, it would simply be that if they acquired 10 percent or more, they would then be deemed to be in control, and of course, that would be a rebuttable presumption, because the language of the bill says, unless the Board finds otherwise.

Is that what you're saying?

Mr. CHERINGTON. Yes, sir. We would leave the reporting feature at 5 percent.

Senator CANNON. And of course you would not attempt to preclude the Board from going in on cases of under 10 percent at any time if they saw fit?

Mr. CHERINGTON. That's correct.

Senator CANNON. Now, you raised the question of whether or not the antitrust laws, whether there might be a problem there. Would you suggest that we add language there to require the Board to consult with the Justice Department in reviewing such acquisitions or what? You're not suggesting that they have—that the Board exercise exclusive authority with respect to antitrust matters?

Mr. CHERINGTON. No. Whether the way to handle this is by requiring them to confer or consult with the Justice Deparement or something else, I don't know what I'm prepared to say.

But we didn't want this exemption from the antitrust laws that typically carries with Board approval to go too far in these situations.

Senator CANNON. Now, this bill goes only to the point of reviewing acquisitions by noncarriers of carriers. You raised the question of conglomerates. I'm wondering if you feel there should be any review procedure with respect to conglomerate acquisitions by air carriers.

Mr. CHERINGTON. I don't believe we focused on that. You mean the obverse of this situation. I don't believe we focused on that problem. I can't think of any instance where this has happened, although I suppose it is conceivable.

Senator CANNON. Now, do you believe there should be some provision in here to make it clear that the Board does not have to hold a full-blown hearing on every one of these provisions? For example, I'm thinking now of the air taxi operations. There may be certain circumstances under which rules should be drafted so that if no objections were filed or certain other conditions existed, the Board would not be required to go into the matter and make a determination.

Mr. CHERINGTON. I think that would be desirable.

Senator CANNON. Perhaps there should be some language in there to give some discretionary authority to the Board under certain circumstances.

Mr. CHERINGTON. Yes, sir.

Senator CANNON. Thank you very much.

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The CHAIRMAN. I just make an observation that there is no attempt—I hope there would be no attempt in interpretation, rather, that we intend to change the anti-trust laws.

It seems to me that supposing the Board approved of an acquisition, say it was 15, 20 percent. Suppose we say there is a good thing. Or maybe the Justice Department could still say you're violating antitrust laws and bring their own suit.

Mr. CHERINGTON. Well, the point that we were attempting to get at here was that Board approval carries with it an antitrust exemtion.

The CHAIRMAN. Board approval would make it more difficult for their case, but they still could bring the suit if they thought it violated the antitrust laws. They have stepped in, in some cases.

Senator CANNON. I don't think so.

The CHAIRMAN. Why don't they?

Mr. BARER. Once they get the approval——

The CHAIRMAN. Well, we could easily allow the Department of Justice in all these cases by proper language to come in if there is any legal doubt about it.

But I never interpreted this bill to repeal an authority under the antitrust laws. Maybe it does.

Senator CANNON. I think if the Board exercises that approval that would effectively foreclose the Justice Department from coming in under an antitrust proceeding.

Senator COTTON. Perhaps you could take care of it simply by saying that nothing in this act shall be construed as limiting the authority of the Justice Department to enforce the antitrust laws.

Senator CANNON. The language of the act itself, though, I think it would effectively foreclose that. It says the Board shall not approve any consolidation, et cetera, which would result in creating a monopoly and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, et cetera.

So once the Board finds that, that in effect in my judgment would foreclose the antitrust department from coming in in any way, shape or form.

They are making a finding there that is adverse to the finding that the Justice Department would have to try to seek.

Senator COTTON. The fact is, however, that the purpose of the Board is to see to it that those who control an airline satisfy the requirement of being fit, willing and able to perform in the public interest. It doesn't look toward enforcing antitrust laws.

I would say a simple reservation in the act that this was not intended to in any way restrict the power given to enforcing antitrust laws would take care of it.

Senator CANNON. I don't know whether it would or not, but I wouldn't vote for it myself if we will say the Board has this authority and that they shall not approve this unless they find certain conditions to exist, and we will turn around and say that doesn't mean anything, and let the antitrust department go in and make their own finding. I think you need a cutoff point so you know these people wouldn't be harassed forever.

Senator COTTON. Wouldn't it mean something, because the purpose of this act isn't leveled toward violation of antitrust laws? It's leveled

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toward seeing to it that persons controlling airlines and flying the public are proper persons and able to do so. It isn't directed to trying to discover whether one violates the antitrust laws.

Senator CANNON. I don't agree. I think its leveled at that. The language I read says the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control.

That is exactly the same thing that the antitrust department is looking at. Exactly. So we can't say that, I don't think, that this Board is to go into that particular matter and then turn around and say that doesn't mean anything.

The antitrust department can go into it, too.

Mr. CHERINGTON. What I think we had in mind here, Senator, was that—let us say a conglomerate acquired an air carrier and the board approved this acquisition.

My understanding is that that pretty much exempts, by that approval, that acquisition from antitrust prosecution, although I don't want to practice law without a license here.

Then the conglomerate goes on and perhaps acquires another company that has some relationship to the air carrier, but does not fall under this provision. We wanted to be sure that the package that was ultimately put together wasn't immune from the antitrust laws by virtue of the Board's approval of the air carrier acquisition in the first instance.

The CHAIRMAN. Well, if the Board, if the authority of the Board, on acquisition and control under this law they wouldn't need this bill if they could do that. The acquisition of control may not necessarily violate the antitrust laws.

There are two different approaches here.

Senator COTTON. Was the Senator from Nevada reading the authority of the CAB under existing law?

Senator CANNON. Power of the Board.

Senator COTTON. It was my understanding that this bill neither amended or abrogated such power. It was simply to add to it another function.

Mr. CHERINGTON. Well, we may have read more—we may have been seeing things under the bed that weren't there, Senator. We did want to raise this point, which I think——

The CHAIRMAN. The authority exists now.

Mr. CHERINGTON. Is it particularly important in the case of conglomerates.

The CHAIRMAN. If they said that control will violate the competition and antitrust laws——

Senator COTTON. That's a situation that now exists. This is the addition of authority to consider another aspect of the control. I can't understand why it should vitiate the existing act.

The CHAIRMAN. We will have to get some more lawyers here, I guess.

Senator Pearson?

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Senator PEARSON. Mr. Chairman, I find myself in general sympathy with the purposes of this bill. Aren't the capital stock registrations open to any source, including the Government? Isn't that your understanding of the law?

Mr. CHERINGTON. Generally speaking, yes.

Senator PEARSON. What I'm trying to get at is the purpose of the requirement of the reporting here of all ownership over 5 percent and whether existing authorities to check into the ownership of the open registration of stockholdings might be sufficient for the Board to act without drawing these precise lines.

Mr. CHERINGTON. Well, of course, a good deal of the stock is often held in street names and things of that sort.

Senator PEARSON. I understand that.

The CHAIRMAN. If that would be so, and I concur, who would be the reporting authority under this act? The same fictitious entities that might hold it?

Mr. CHERINGTON. The beneficial owner, I presume.

The CHAIRMAN. The CAB now requires a listing if it's over 5 percent. They have a list of the stockholders of all airlines over 5 percent I think now, because the Chairman gave us a list for the record and quoted some of the airlines where the stockholdings were large in some cases by one group and outside groups, too.

Senator COTTON. I recall, however, that the Chairman of the CAB referred to this matter of stock being held in street names and by strawmen. It didn't always reveal the ownership.

As for the reporting, I think that's a very good question Senator Pearson is asking. If someone is trying to get hold of an airline and neither the stockholders nor existing management like it, they will do the reporting pretty quickly.

Senator PEARSON. I would assume so.

Mr. CHERINGTON. We read this provision as putting rather—well, putting the burden of this on the beneficial owner.

Senator PEARSON. I understand.

Mr. CHERINGTON. To solve, I guess, the problem that Chairman Crooker raised in his testimony.

Senator PEARSON. Well, for what it's worth, and I won't prolong it, I concur with the view of Senator Cannon. One more lawyer's opinion means one more different opinion, but to make a finding by the CAB as to what does or does not represent ownership or control seems to me to fulfill or negate one of the requirements of the antitrust action.

I would view that second part—I'm not sure it's a bad thing to do—merely to agree with the Senator from Nevada as to what the effect would be in relation to antitrust prosecution.

The CHAIRMAN. We had the same problem with legislation affecting the Federal Power Commission at one time. They wanted the authority to pass on the licensee.

Senator PEARSON. And what did or did not represent ownership and control.

The CHAIRMAN. Whether or not it took away some of the authority of the Department of Justice in the power field, that they would make the decision, and they made the argument they were better qualified to determine what would be in the best interests of the public in this

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respect in the power field than the Department of Justice antitrust division.

Senator PEARSON. They probably were.

Mr. CHERINGTON. Would it be helpful for Mr. Tidd to put in the record specifically what the thoughts in the Justice Department were on this that were conveyed to him yesterday?

Senator PEARSON. I wish he would summarize them.

Mr. TIDD. We discussed this with the Justice Department staff yesterday. This is, obviously, just a staff opinion and not necessarily the Attorney General's opinion, but their concern was this:

Section 414 of the FAA act specifically immunizes from antitrust prosecution any order of the Board under section 408, so any determination by the Board under 408, any order, is automatically immunized from antitrust.

Section 414 states that any person affected by any order is immunized and all of the restraints or prohibitions made by or imposed under authority of law insofar as may be necessary to enable such person to do anything authorized, approved or required by such order is immunized.

The staff is afraid that in the conglomerate situation they cannot know what the final legal reach of the Board's order might be. Its effects might extend throughout the conglomerate structure and, in effect, immunize a lot of things under the possibility of being "necessary to enable such person to do anything authorized" by the order.

They are just uncertain about that ambiguity there.

Senator PEARSON. And they would feel that way whether it's 5 percent or 10 percent.

Mr. TIDD. Yes. I think they are reporting to the committee and they will probably deal with this, but they are uncertain as to what the consequences would be given the peculiar nature of conglomerate organizations.

The CHAIRMAN. But we gave the CAB much broader authority in the original act than this bill gives them. This is merely an addition dealing with certain situations. That act is pretty broad, as Senator Cannon read it.

Mr. TIDD. Yes. It's just that, historically, these have more or less been confined to transportation situations.

The CHAIRMAN. Well, our staff points out to me that there also is some school of thought that this bill raises the antitrust issue of conglomerates for the first time in this particular field.

Mr. CHERINGTON. Right.

Senator HANSEN. I have a question or two.

No. 1, I am not clear at what point in time the CAB would raise the question as to the desirability and public acceptability of a purchase of stock, whether it be 5 percent or 10 percent.

I would like to ask, Mr. Cherington, would a prospective purchaser have to declare his intention to the Board prior to the purchase if it were to exceed or were to equal 5 percent of the total ownership? Is he required to do this, as you understand this bill, before he makes the purchase?

Mr. CHERINGTON. I think that before—yes, I would think that he would. He has to file an application, as is presently provided for

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in 408(b). He applies for approval. Whether he can put the stock in escrow or have it—I would say this was prior to the acquisition.

Senator HANSEN. You say put the stock in escrow. You mean the owner might place it in escrow with the provision that if it is cleared by the CAB the transfer would become finalized with CAB approval. Is that what you are saying?

Mr. CHERINGTON. Yes.

Senator CANNON. I would like to get in an argument on this. I don't think that is right. I think all this does is make it unlawful for the carrier to acquire control in any manner whatsoever and it imposes criminal penalties. Then it goes on to stay that you have, presumptively, acquired control if you acquired more than 10 percent. But that is a rebuttable presumption.

If they don't and if they acquire control in violation of the provisions of this act there are criminal penalties. It doesn't say you have to file with them first so they can make their determination. It does say that it is unlawful for you to acquire control and under certain circumstances certain things are deemed to be controlled. That is as I understand it.

Would you agree with that?

Mr. CHERINGTON. My understanding is that if you follow section (b) of 408, if you went above the threshold, whether it be 5 percent or 10 percent, you would have to apply for permission to do this before you acquired the stock.

Now below the threshold, presumably you would be acquiring stock or other forms of control at your own risk. But if I read the pending bill in conjunction with section (b) I think it has to be done before the acquisition.

Senator CANNON. Section 408(a) says it shall be unlawful unless approved by order of the Board as provided in this section, and then goes on, in the section in question, for any air carrier or person controlling an air carrier, or any other common carrier or person engaged in any other phase of aeronautics to acquire control of any air carrier in any manner whatsoever.

Now that makes it unlawful for them to acquire control unless approved by order of the Board.

It is possible for them to acquire control and to have not been approved by the Board even if they had less than 10 percent, let's say, and still that is an unlawful act and is subject to a criminal penalty. But if they had gotten the Board approval first of course they would have been exempt from any unlawful act.

Mr. CHERINGTON. I think that is correct, below the threshold.

Senator HANSEN. I simply then would like to raise one further point, recognizing that this one may not be resolved to the complete satisfaction of everyone.

What effect could this situation have upon the value of a share of stock? It would seem to me that there would be inherent in this situation opportunity for some capriciousness, at least, if someone, for reasons unknown or undisclosed, wanted to bring about a situation that could at least cast an air of uncertainty as to the value of stock. You could declare your intention to purchase and then have it held up by the Board pending their determination as to what effect it would have

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on the airline if the purchase were consummated and whether or not the purchaser conformed to the intent of the overall legislation.

I don't have an answer to this. I just think it is important that we be aware that there are some other ramifications that I think could redound to the benefit or injury of other stockholders who would have no part in it one way or the other.

Mr. CHERINGTON. I suppose that is conceivable, Senator. We feel, that the advantage of this legislation would overweight the risks that it would be used for the purposes you mentioned. We would feel so particularly as the Board develops standards so that it is not going to be choosing between the good people and bad people but on some fairly definite standards.

Senator HANSEN. I didn't mean to imply that I was opposed to the legislation. I am just trying to understand it better and to be certain that I am aware of the ramifications that it might hold for stockholders. It was in that context that I raised the question.

I have no further questions.

The CHAIRMAN. The bill, of course, poses all kinds of complications. Our purpose is to try and find out what they are and see if we can meet the objectives by minimizing the complications to achieve, in the public interest, or at least forestall or refuse control of an air carrier which is serving the public by someone undesirable. The only way the CAB could get that would be to require a notice of intent that says I intend to buy 15 percent of an airline. Could I have a hearing on it? State the purposes, or say that I have bought and would want your approval.

This could be true—as I pointed out—in railroads or anything else. It is very complicated. It surely poses more problems than we thought in the beginning when we were trying to meet a situation that was somewhat urgent at the time.

You will find up here after some experience that legislation has to be ground out to be sure it will achieve its objective. It can't be done in too hasty a manner. That is why we are having these hearings.

Mr. CHERINGTON. Yes, sir.

Senator HANSEN. I do think one further question would help. Let's assume a hypothetical case wherein if I would assert an intention to acquire some stock and the CAB would research my background and consider all of the ramifications that might result from the purchase. If all of these things were done and everything was cleared, under the bill there still would be no implied assumption of responsibility on my part to complete the transaction, would there? I mean I could declare my intention and considerable effort and research might follow. Then I could say, well, I thought it over and I don't think I will buy it after all.

Mr. CHERINGTON. I didn't so read the bill; no. You could withdraw at any time.

Senator HANSEN. That is all, Mr. Chairman.

The CHAIRMAN. I suppose there is a problem, too, in other forms of transportation of noncitizen investment, but in those cases—if it

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reaches a point—we don't want to encourage or discourage legitimate foreign investment.

Senator COTTON. In the final paragraph of your statement you make several recommendations. You recommend the bill which prohibits control, et cetera, be retained.

You also recommend that presumptive control be raised to 10 percent.

If the Board be granted discretion it seeks with respect to granting exemptions, et cetera.

Now, those are all clear-cut recommendations by you favoring the bill with certain changes. I assume that this is the result of conferences within your Department, including your Counsel and his conferences with the Department of Justice. Is that right?

Mr. CHERINGTON. That is correct.

Senator COTTON. The final recommendation, that the area of the Board's inquiry be clearly delineated by the committee, throws it back into your laps, the complications that this bill actually creates, interference with the provisions of the enforcement of the antitrust laws; right?

Mr. CHERINTON. That is one of the areas. Foreign control might be another.

Perhaps it would be desirable to clarify the committee's intent not to have this bill or this legislation used to lock in a particular management or prevent acquisition of control at all or to slow it down and make it more difficult.

Senator COTTON. I don't quite understand that last statement. It is the intent of the committee to what?

Mr. CHERINGTON. Our understanding of the intent of the committee is that you wanted to be sure that the air carriers weren't controlled by groups that might reduce competition, that might involve foreign interests, foreign domination, but that you are not intending to slow down necessarily or impede desirable acquisitions.

Senator COTTON. So long as the type of people acquiring the control are fit, able, and willing, which means that they would conduct the transportation for the service of the public with safety; right?

Mr. CHERINGTON. Right.

Senator COTTON. So the main issue raised by the last line in your statement, which calls attention to some complications here the committee must consider, the manner of enforcement of antitrust laws; wasn't it?

Mr. CHERINGTON. That was one thing; yes.

Senator COTTON. It is one thing you mentioned in your statement.

Now you are mentioning quite properly, of course, foreign acquisition and so on. But, when you presented the statement, wasn't the main point that you had in mind as being something which had to be taken care of in the bill, the matter of antitrust implications when you say the area of the oBard's inquiry be cleared delineated by the committee?

Mr. CHERINGTON. I also had foreign acquisitions in mind which I think I mentioned somewhat further up in my statement.

Senator COTTON. Thank you.

The CHAIRMAN. They might be willing and able and not fit.

Mr. CHERINGTON. That is right.

Senator PEARSON. May I——

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The CHAIRMAN. Let me ask this question—well, I will ask Mr. Tipton who will testify next. I was thinking, too, of foreign investments.

(Discussion off the record.)

The CHAIRMAN. I want to ask the staff, too, on registration of foreign buying, if the SEC requires any registration of foreign investments in American transportation companies or any company when they reach a certain proportion. I don't know. We can find out whether they have the authority to do that.

Thank you very much.

Senator PEARSON. Let me ask one more question.

The CHAIRMAN. Excuse me. Certainly.

Senator PEARSON. In considering section 3 of the bill, you recommend an amendment increasing from 5 percent to 10 percent to be deemed ownership. Was any consideration given to the proposition that no percentage be specified and that the Board could, from case to case, in consideration of the various stock structures and number of shares and so forth, make a determination without reference to percentages?

You say the authors of the bill said 5 percent shall be deemed ownership. Your recommendation says 10 percent. It is entirely possible, given different situations from company to company, that 7 percent may be or 8 percent may be or even under 5 percent.

Aside from the antitrust insulation that is involved in that section, was any thought given to permitting the Board to make a discretionary determination from case to case?

Mr. CHERINGTON. Yes, sir; we did consider that. The elimination of either 5 or 10 or any other number like that. We decided that it was probably desirable to have a threshold. It didn't preclude the Board from getting into situations below the threshold where it had reason to believe there was control. This may also relate in part to the question that was raised concerning whether you could acquire stock before approval or not. We felt that it added some certainty or clarity if there was a threshold in there.

Senator PEARSON. With reference again to the antitrust issue, people acquire stock and ownership with no sense of certainty in reference to any Justice Department action. I am just concerned with the very, very different nature of various companies and different airlines which have very good intentions. We may lock ourselves into a bad situation and never really achieve what this bill sets out to achieve. It might be that Congress doesn't want to give the Board that kind of discretionary power. But I am really just going over the old, old ground of where do you draw the line. Eventually you have to do it. That is what it amounts to.

The CHAIRMAN. The 10 percent of course is only the presumption.

Mr. CHERINGTON. That is right.

The CHAIRMAN. I think the language, at least we wanted the language to say the Board could go down below that on their own initiative if they thought a case happened where it is 7 or 8.

Mr. CHERINGTON. That was our reading.

Senator COTTON. Before Senator Pearson came in, we had an exchange on that point which I raised with the Secretary. He indicated that he considered that the bill as drafted enables the Board to go below whatever the presumption of 5 or 10 percent.

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Frankly, I couldn't quite see that such was clearly indicated in the bill and inquired as to whether it perhaps should be clarified. Senator Pearson may remember the day before yesterday I raised the question with the CAB as to whether it was even desirable to have a percentage, or whether there should be none at all. I think their answer was just the same as the Department of Transportation. They thought there should be a percentage which would constitute a presumption. However, they recommended 10 instead of 5 percent. I don't recall if they indicated whether any revision of the bill was needed to make clear that in other situations, if necessary, the Board could go below this threshold.

Is that a correct statement, Mr. Secretary?

Mr. CHERINGTON. Yes, sir.

The CHAIRMAN. It should be made clear.

Senator Pearson. Do the other sections of the bill indicate from this percentage constitutes a presumption? The language in this bill doesn't appear to accomplish this. It says shall be deemed to be control.

Mr. BARER. Senator, the presumption is deemed to arise from the language at line 13, page 2, which says: "shall be deemed to be in control of such carrier unless the Board finds otherwise," so this is a burden of proof presumption which can be rebutted in a hearing.

Further up on page 2 at line 4, that paragraph is intended to give the Board the authority to look at any acquisition of control regardless of the percentage of stock involved. In contrast, the CAB recommended legislation yesterday that didn't just carry a presumption. It would have blocked the Board's authority to go below 10 percent. That was the issue that was raised with the Board.

The CHAIRMAN. What the Board suggested, as I understood it, was that they wanted some figures like this because they didn't want to be dealing with holding hearings and all the time and energy and cost it would take each time someone bought a small percentage of an airline, for instance. They made quite a point of the procedural problem and of course they took a look at Senator Cotton and myself and said of course we will need some more appropriations and more people.

(Laughter.)

Senator PEARSON. One more question.

Under this bill who may raise this issue? Only the CAB?

Mr. BARER. To initiate a hearing?

Senator PEARSON. Yes.

Mr. BARER. Anyone seeking control would apply to the CAB for approval. At that time there would be a hearing if more than 5 percent or the 10 percent were involved, depending on which figure we used. If it was below that it would be up to the Board to either approve or to set it down for hearing depending on its regulations.

The CHAIRMAN. The Board would have to take the initiative under the figure used. Over there would have to be an application for them and that would start the proceedings.

Senator PEARSON. Who could make the application? Any interested party?

Mr. BARER. I suppose any interested party could object and call to the Board's attention there was an issue of control but the original application would be by that party seeking to acquire control.

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Senator COTTON. Other stockholders or a management in existence could complain to the Board and ask for a hearing, could they not?

Mr. BARER. That is my understanding.

Senator HANSEN. Mr. Chairman, if I could, let me ask one further question to clarify my understanding.

The present act applies only to air carriers trying to buy other air carriers and this legislation would expand that to relate to situations where outside interests are trying to come in.

The CHAIRMAN. That is the general purpose of it.

Mr. CHERINGTON. Pardon me, I think it is other carriers of any kind, with the present act. Other carriers——

Senator HANSEN. Railroads or buslines or steamshiplines?

Mr. CHERINGTON. Or companies engaged in any phase of aeronautics.

Senator HANSEN. I see.

The CHAIRMAN. It applies to air carriers or persons controlling an air carrier or any other common carrier. Of course we always tried to keep separate the modes of transportation. We haven't always succeeded. There are escape clauses. Some railroads own some trucklines. One truckline is trying to buy a railroad.

I know of a railroad who would like to buy a steamshipline. We try to keep them separate generally but the ICC in those cases or the Maritime Commission could approve. But all the agencies in transportation have now the absolute authority as between the carriers themselves in the same business

Mr. CHERINGTON. That is right.

Senator HANSEN. Thank you.

The CHAIRMAN. All right.

Thank you, Mr. Secretary. We appreciate very much your testimony and in particular because we know that we didn't give everybody too much time to look at this in depth and I think you have taken a good hold of it for the time you had to work on it.

Mr. CHERINGTON. Thank you very much.

STATEMENT OF STUART G. TIPTON, PRESIDENT, AIR TRANSPORT ASSOCIATION

Mr. TIPTON. Mr. Chairman and members of the committee: I am president of the Air Transport Association, which has as its members most of the certificated scheduled airlines of the United States.

I have a short statement, Mr. Chairman, which I will present.

The Air Transport Association appreciates the opportunity to comment generally upon the bills before the committee which would require Civil Aeronautics Board approval for certain acquisitions of control of air carriers not clearly covered by the prescent Aviation Act. Recognizing the complexities of the issues, individual ATA members may wish to file additional views and recommendations.

Under the present act, control of an air carrier may be acquired without CAB approval, unless the acquiring interest comes within these categories of persons: (1) another air carrier; (2) persons controlling another air carrier; (3) another common carrier; or (4) a person engaged in any other phase of aeronautics. If the acquirer is one of these persons, CAB approval of the transaction is required

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by section 408 of the act. If not, the acquisition does not have to be passed upon by the CAB.

This situation is incongruous, in that the formal transfer of a carrier's certificate to a person not named in section 408 would require CAB approval (under sec. 401 of the act), yet a transfer could be achieved in effect by the alternative of simply acquiring control of the airline, which would not require CAB approval. This anomaly is incompatible with the congressional purpose in the act to give the CAB the authority to determine whether the operators of an air carrier are fit, willing and able to provide air transportation which serves the public interest, convenience and necessity.

Recent public disclosures of possible acquisitions of Pan American World Airways and of Western Airlines have focused legislative attention on the problem.

The immediate issue is one of the acquisition of possible control of a carrier required by law to be operated in the public interest, where the acquiring entity may not be subject to such regulation and may or may not be properly equipped to continue such operation in the public interest. In such a case, the CAB should have the necessary authority to protect the public interest.

The reasons why the Board should have the opportunity to pass upon the public interest aspects of all acquisitions of control of an air carrier were cogently stated by Chairman Crooker, of the Civil Aeronautics Board, in his earlier statement to the committee, and I shall not take up the committee's time by repeating them. A majority of our members at least support the need for such legislation, and support the principles of S. 1373. However, we do suggest some changes.

First, we agree with the Board, the CAB, that it should retain reasonable flexibility to grant prompt approval where there are no conflicts of interest or other regulatory problems presented by a minor proposed acquisition. Accordingly, we would propose a further amendment of subsection (b) of section 408, similar to that proposed by the Board, to provide for a determination by the Board that no hearing is required in the case of an acquisition of control of an air carrier where the conditions of the third proviso of section 408(b) are satisfied: viz., (*a*) it does not create a monopoly; (*b*) it does not tend to restrain competition; (*c*) no person disclosing a substantial interest is currently requesting a hearing; and (*d*) the Board after public notice determines that the public interest does not require a hearing.

Thus amended, section 408(b) would permit the Board to approve minor acquisitions without hearing in those cases where no person with a substantial interest requests a hearing. Undue procedural burdens on the Board could thereby be avoided, and the Board could approve routine acquisitions by a simple order. At the same time, the Board would retain reasonable control over frivolous or obstructive requests for public hearing from persons not actually possessing a substantial interest. The "substantial interest" test has been construed by the Board as broad enough to enable it to determine whether a petitioner for hearing "has, in fact, presented a legitimate and substantial issue."

Second, we wish to comment on the provisions of paragraph 3 of section 1 of the bill (page 2, line 10). This section establishes a pre-

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sumption that anyone owning 5 percent or more of the capital stock or capital of an air carrier does, in fact, control that carrier. At the moment I am not in a position to state firmly to the committee that the industry supports the 5 percent figure. Within the nex few days I will be able to clear up that point. From discussions with various airline people I gather that there is some question as to whether the 5 percent is too low. In relation to that same provision, we note particularly that it refers not only to capital stock but also to "capital." This introduces ambiguity in the provision, because it is very difficult to determine what is referred to by "capital."

We would suggest that reference to "capital" be deleted in that section in order to provide for a clear reference to capital stock.

The control of an air carrier can affect the performance of its public service obligations under its certificate. This is clearly a matter of proper concern to the Congress and the Civil Aeronautics Board, particularly where the acquisition is by a noncarrier or nonaeronautical entity. For this reason we support legislation to insure that such relationships are in the public interest.

Now, during the course of the discussion this morning a number of issues have been raised which I might continue, if the Chairman desires, to discuss as I go along.

The CHAIRMAN. Yes, go right ahead. There were many complex questions raised this morning involving not only the bill but some of its ramifications.

Mr. TIPTON. Right, and they have been good questions. They tend to demonstrate the wisdom of just such public hearings as we are having now.

The CHAIRMAN. There are more than we thought when we introduced the bill.

Mr. TIPTON. There always are, Mr. Chairman. I'm sure your experience proves that.

The CHAIRMAN. That's why legislation has to be worked out as we are trying to do.

Mr. TIPTON. Good. First, on the question raised frequently, and properly raised, as to whether it makes any sense to have a percentage figure stated in the statute, as one which establishes a presumption of control, whether it be 5 percent or 6 percent or 10 percent or whatever, we rather think that it's a good thing to put such a presumption in, because it tends to eliminate a great deal of dispute as to what constitutes control in a particular instance.

The way it works, as has been said, the issue in the matter is, does this particular transaction result in establishing control of the air carrier? That's a question of fact. Does he or doesn't he? The issues are broad. It could be established he will control by having 1 percent. It could be he had control by some other means, I suppose, but the question of fact is control. Does he get it or doesn't he?

Now, in order to administer this, and this is the only importance of this presumption provision, in order to administer that with efficiency, it probably makes sense to say that if you have—if this transaction will result in your having 5 percent of the stock of this carrier, we are going to presume that you have control.

Now, the acquirer might well come in and say and demonstrate to the Board, well that 5 percent doesn't constitute control. Here is an-

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other stockholder with 25 percent. The Board, in a situation like that, is likely to say you meet the presumption. You are not acquiring control. We don't have to pass on the transaction.

On the other hand, it might be demonstrated in the hearing that the—that 1 percent that he is actually acquiring is control and the statute would be applicable to it.

This is wholly an administrative matter.

The CHAIRMAN. That is why it has to be case by case.

Mr. TIPTON. That's right. As a result of this discussion, I thought when I started listening to this discussion that the language was pretty good. I now think it isnt' very good, and I think that we will, if it's all right with the committee, try to draft a provision that accomplishes this administrative purpose that I'm talking about without creating difficulties and submit it to the committee.

The CHAIRMAN. We appreciate that. Another thing, in your statement, I do hope that—I know this takes a little time and I know that you have contacted as many of your people as you can. They have to have a little time to look too, to see how it affects them, because this is a bill for all airlines, scheduled and nonscheduled, and you will pursue that and we might give the committee the benefit of what you found out.

Mr. TIPTON. We will do so.

Senator PEARSON. I think I understand it better now. What you are saying is that the percentage only determines who has the burden of proof.

Mr. TIPTON. Exactly.

Senator PEARSON. So under the original bill over 5 percent puts the burden on those who acquire stock; beneath it, it puts the burden on the CAB.

Mr. TIPTON. Or whoever is trying to make the case.

Senator PEARSON. Can't we determine the proper percentage by reference to current controlling interest in airlines or air carriers today?

Mr. TIPTON. I think what needs to be done is an examination of the precedents on this point. What percentage has been regarded as proper for this particular purpose. It might well be 10. If you want to shift the burden of proof quickly, in effect, you would adopt five.

In that area, I must say I don't know even if my own mind is made up on which is right. What I want to do in the next very few days is to go a little further into that and be able to make a positive recommendation to the committee.

Senator PEARSON. To determine what generally represents ownership and also to determine that which will keep frivolous cases from coming before the Board?

Mr. TIPTON. Exactly. That must be an important factor here. If you state this presumption too low——

Senator PEARSON. Stockholder fights get to be pretty complicated and pretty vicious, using every avenue, every tool, every remedy available.

Mr. TIPTON. You are exactly right.

Senator PEARSON. I can see them running to the Board constantly.

Mr. TIPTON. We will make that exploration and come back with a specific recommendation as fast as we can. Now, to move from that,

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also some other important questions of real consequence were raised, partly out of the committee's discussion, partly out of the discussion by Mr. Cherington.

In Mr. Cherington's statement, he seemed to recommend that in this type of case the scope of the Board's inquiry into this particular transaction be in some respect limited. His recommendations there weren't very specific. On having heard that recommendation, I was right concerned, because I think that what—this bill and the practice under it should fit into the existing pattern of the statute.

This is no great new legislative principle that is being adopted here. It is much like the practices that have been going on ever since 1938 under the act in which acquisitions of control must be approved by the Board.

The Congress has dealt with this question of the areas of the Board's inquiry. The first thing it says in the statute now is that the Board will approve one of these acquisitions of control if it finds that it is not adverse to the public interest.

I am paraphrasing a little there. And the Congress in the statute has also, years ago, sought to specify the areas of public interest that the Board should take into account.

The CHAIRMAN. I think at this point, because we discussed this bill's application to 408 so much, I think we ought to put in the record section 408 in full so anybody can look at it.

(Section 408 follows:)

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

ACTS PROHIBITED

SEC. 408 (72 Stat. 767, as amended by 74 Stat. 901, 49 U.S.C. 1378) (a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier, to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

Mr. TIPTON. In defining, the Congress in this statute actually specified in section 102, it says that in the exercise of performance of its duties under this statute the Board shall consider the following aspects

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as being in the public interest, and then it lists a list which, generally speaking, sets forth what the whole purpose of the statute is driving at.

Now, that adequately defines the Board's scope of inquiry here. I would recommend against the committee seeking to define for the purpose of this one amendment the scope of the Board's inquiry. I would just fit it into the statute as it is and let these well thought-out provisions that have been worked over and used for 30 years or so govern them, because they are good ones and they worked.

Second, on the antitrust problems that have been discussed, here again you have a well-established statutory pattern that has, as I say, worked for a lot of years. The pattern is pretty much this: In these acquisitions of control and approval of certain contracts, the Board is—they are subject to the Board approval. The Board considers them. And approves them. If they approve them, then the parties to the contract or the acquisition are relieved of the antitrust laws to the extent necessary to permit them to do what the Board has approved. It's a fairly narrow area in which they get to move.

Now, the antitrust principles that the Congress has laid down and that have been administered for many years are adequately protected in the present statutory pattern, because the Board, in considering one of the cases of acquisitions or contracts or the like, gives notice to everyone, including, of course, the Department of Justice, in which antitrust proceedings are largely entrusted and the Department of Justice has opportunity, and often exercises it, to come before the Board and say that—and take a strong position, or any position, as it affects the antitrust laws.

Then the Board taking the antitrust problems and the transportation problems into account, reaches a decision and approves or disapproves. When that is finished, you have had the principles of both statutes applied, and thus, here again, this particular provision can be fitted directly into this pattern, and I would recommend against any experimental provision on antitrust laws to be put in this new section.

Congress has worked this out. It worked over the years. Again, I wouldn't try to put experimental restrictive provisions in.

Senator COTTON. May I interrupt you?

Mr. TIPTON. Certainly.

Senator COTTON. You have clarified my understanding a great deal. When we were having our earlier discussion, you may remember that I indicated I couldn't see why we had to put into this bill anything one way or the other about the antitrust laws. You have said you want to look into this further. Was this one of the things?

Mr. TIPTON. No. I can be real positive in recommending that the present statutory pattern be left to govern this particular application as well as all others.

Senator COTTON. This is your considered opinion that this bill need not have any effect one way or the other on——

Mr. TIPTON. 414 is the applicable section.

Senator COTTON. This simply gives the Board certain additional powers for certain sets of circumstances without affecting the general pattern?

Mr. TIPTON. I feel firmly that that is the case. I think that the com-

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mittee need not worry about it, particularly, both antitrust principles and transportation principles.

Senator COTTON. Well, you will submit—as you kindly indicated you would—rewording of certain sections. Are you going to indicate amendments or changes that you suggest throughout this bill?

Mr. TIPTON. Yes. I hope the committee will forgive me for not having them attached to my statement this morning, but I just didn't get caught up with it. But I will, and we will get them in in a very few days.

Senator PEARSON. May I interrupt also? I concur in what you say about the determination of the Board providing insulation against antitrust procedures only to the extent of the order of the Board, but here it is controlled so that is it.

But since that is so, how do you relate that to the percentage that you find to be advantageous in creating and shifting?

Now, since it is insulation, is it better to have it 5 percent or 10 percent?

Mr. TIPTON. Neither the 5 percent nor the 10 percent are final. Their only function is to place the burden of proof one place or another.

So I don't believe this question of antitrust application has a bearing on the percentage. I don't believe it does. I believe that the percentage is pretty much immaterial, since it's not final and doesn't really settle anything in all cases, I don't believe it does.

Senator PEARSON. I think my point, which is sort of a fussy one, was that the Justice Department, coming in as it does in so many instances to make its case as to whether this control represents violation of antitrust, is subject to the same presumption and the same burden of proof as anybody else.

Mr. TIPTON. Quite right. That would be true. In such a case, in an acquisition case, if Justice were in it, that presumption would operate with respect to their case as well as everybody else's case. Yes. It is true.

The CHAIRMAN. How do you reconcile that with—I don't disagree with you—with what Senator Cannon said that under 408 the Department of Justice would be precluded once they made a decision on all the factors involved in 408 which also includes the question of control?

Mr. TIPTON. That's right, and I think what Senator Cannon was saying was once the Board has approved, then, within the area of that order, within the area of that approval——

Senator PEARSON. But the area of the order is control. That is the whole issue.

Mr. TIPTON. That's right. But prior to the entry of that order, the Department of Justice has wide open opportunity of course to appear in the proceeding, bring forth the facts which, to it, cause the Department of Justice to feel this shouldn't be approved and thus their arguments and their positions are made clear at that time.

Once the order is entered, then——

Senator COTTON. Prior to the entry of that order, can the Department of Justice bring suit or take action?

Mr. TIPTON. That leads me to the question Senator Hansen was talking about, as to what time all this takes place. Let me make a little more extensive answer to your question an cover them both. As a matter of practice, under the statute as it is, those who wish to acquire control,

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which is covered by the statute, those who wish to acquire control make application to the board for approval before they actually start the transaction, because the law here—under the law here you act at your peril, as in most other laws.

If you acquire control without the Board's approval, then you have violated the law, and you're in great difficulty. As a matter of fact, as I recall the doctrines the Board has established in the past, they said in those cases—and there have been some—where control has actually been acquired prior to approval, the Board has entered an order telling the applicant in effect that they will not consider the matter until he has disposed of control and starts all over again, so that the process here and the process that eliminates the uncertainty, that Senator Hansen was concerned about, that the parties to these transactions protect themselves by filing applications.

Now, some of the applications say that I don't think I'm acquiring control here or I don't think that the statute is applicable to me, but I'm filing this application nevertheless and I want the Board to act upon it.

We think you ought to dismiss it but if you think you ought to consider it, consider it and approve it. The uncertainty and the difficulty of timing has been solved in the past in that fashion and here again I would say just fit this amendment into the statutory pattern that has worked and if any of the persons who have not been previously covered by the statute want to acquire control, they can file an application, state their plans and either get approval or if the Board says that it's not subject to approval, proceed.

The CHAIRMAN. Does the Board now have authority to act on the matter of control?

Mr. TIPTON. It has authority to act on matters of control, but it's only as limited in the statute for instance, acquisition by a common carrier or a person engaged in aeronautics.

The CHAIRMAN. It is limited to the conditions under the section 408?

Mr. TIPTON. That' right.

Senator COTTON. Just one more question. This may be a little out of your line, but this bill does extend section 408 to noncarriers and nonaeronautics people, right?

Mr. TIPTON. Yes.

Senator COTTON. Now, among the other perplexing questions that have been raised in this morning's hearing is the matter of whether this committee—if we proceed with this bill and allowing that it passes both Houses and becomes law—has collaterally establishing precedents and entered into the broad question of conglomerates.

As a matter of fact, this has nothing to do with conglomerates as such. It simply means that if someone who is not a carrier, seeks to acquire or is apparently acquiring control of an airline, then the CAB may consider whether such persons are fit, willing and able to provide the transportation and whether it will serve the public interest, convenience and necessity.

This does not authorize the CAB to go into the question of whether conglomerates are good, bad or indifferent or whether this is or is not a conglomerate. It simply goes to the question of whatever the other interests the person or corporation seeking to acquire the control may

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hold, whether such person or corporation is fit to control the airline safely for the public and justly to the stockholders. It is confined to that, isn't it?

Mr. TIPTON. I concur completely with what you have to say. It doesn't have anything to do with conglomerates as such. If a conglomerate wishes to acquire an airline, sure, it covers them. If a person who has no connection with a conglomerate wants to do so, he is covered too. The committee is striking at the essence of the soundness of the air transport system. They are—this loophole has been pointed up in which the acquisitions can be made of airlines without being checked by the CAB. That's all you are dealing with.

The CHAIRMAN. He may be willing and able, but not fit.

Mr. TIPTON. That might well be.

The CHAIRMAN. There are a great number of outside interests that have much more stock in airlines than 5 or 10 percent.

Mr. TIPTON. Well, I don't know whether they have or not, but outside interests——

The CHAIRMAN. CAB gave us a list. Northeast, Mr. Storr owns 85 percent of the airline, and he is in the broadcasting business. But they concluded that he was, I guess, fit, willing and able, underlining fit. The Senator from New Hampshire thinks they have gotten better service up there.

Senator COTTON. Yes, we are very happy about it. Of course, he can use his broadcasting knowledge by having radio programs and television inside the planes. [Laughter.]

The CHAIRMAN. I wanted to ask one question here as a procedural thing. The CAB made quite a point on the fact that they didn't want to be burdened—you point that out—with every little acquisition of stock that didn't or wouldn't even create an implication that there might be a control involved.

Therefore, they would—I think they agreed or suggested the percentage so they could get away from all kinds of cases below that point that might be a smaller amount or a mutual fund buying it for investment or things of that kind. How are we going to get away from them being overburdened?

Mr. TIPTON. I think in the first place, we have agreed and we think rightly, to the elimination of the present necessity of hearings.

The CHAIRMAN. They recommended that?

Mr. TIPTON. They recommended that. That seemed perfectly sensible so long as it's hedged about so that the persons having a substantial interest have a hearing.

The CHAIRMAN. Would you require registration of the sale of airline stock, all stock?

Mr. TIPTON. I don't think so. I think the reporting requirement that is in the bill which says that——

The CHAIRMAN. When it gets over a certain percentage they should be able to say here, and then they could even then, without a hearing, say this looks all right but if it looked like it was going up to control and the person wanted a hearing or attempted control, then the hearing process would take place.

Mr. TIPTON. Another way of limiting this problem, the term used in the bill is air carrier. That's quite a broad term. Now the Board has

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exempted from economic regulations a large number of operators that would otherwise be air carriers. Air taxi operators, fixed base operators have been exempted. It might make some sense to have this bill cover certificated air carriers which include the freight carriers and the scheduled airlines, and supplementals, and so on.

The CHAIRMAN. What do you suggest about the term we use?

Mr. TIPTON. I would refer it, I believe, subject to thinking about it a minute, Mr. Magnuson, a certificated air carrier, I believe.

The CHAIRMAN. You wouldn't extend it to nonscheduled, nocertificated, which includes some cargo carriers——

Mr. TIPTON. Includes cargo carriers and all the supplementals.

The CHAIRMAN. Some nonskeds and a great growth in the country of air taxi service.

Mr. TIPTON. That's right. I think that would help them solve it. I believe that the chairman mentioned exempting these smaller carriers in some fashion.

The CHAIRMAN. Now. you mentioned one other thing at the end. You suggest that we take out the word "capital"?

Mr. TIPTON. Yes.

The CHAIRMAN. Can you explain what you mean by that and why?

Mr. TIPTON. The only reason there is that in this provision, to which I refer here, we have capital stock and capital. Now, I was unable to determine what capital meant. It appears in other places in the statute but no one ever quite defined the difference between capital stock and capital. One of the difficulties that it introduced or might introduce, is——

The CHAIRMAN. I presume we were thinking about assets, mortgaged airplanes.

Mr. TIPTON. One of the things it would introduce is an uncertainty as to whether it includes debt, as you referred. I think really it ought to be clear and it ought to refer to capital stock which—we are actually getting to the question of control here. That is what we are interested in.

The CHAIRMAN. CAB, the day before yesterday, made that point. They suggested we substitute the word for capital, "10 percent of any class of equity"—they made that suggestion.

Senator COTTON. Both preferred and common stock?

The CHAIRMAN. Any equity that they had.

Mr. TIPTON. I had some trouble with referring to any class but I think—I'd better not try to——

The CHAIRMAN. Ten percent of the equity.

Mr. TIPTON. What we are talking about is the type of security the holding of which results in control. How we state it is another matter, but that is what we are talking about, I think.

Senator COTTON. While we are casting light into the dark, could you tell us if you represent all the airlines? Obviously you don't want to go into either the Pan American situation or the Western situation because you might not be authorized to represent them individually. Neither of these carriers has testified and I don't know the facts. However, it seemed to me that whoever it is seeking control of Pan American acquired only 2 or 3 percent of the stock and as one not accustomed to great manipulations I can't quite understand how anybody, by getting 2 or 3 percent of the stock in a huge airline, can acquire control.

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Can you tell me?

Mr. TIPTON. I think that without reference particularly to either one of these transactions, the airline, larger airlines, a very high percentage of the airlines, are very widely held with—in which a relatively small stock acquisition could provide for effective control.

Senator COTTON. In other words, you may not have much stock but you have more than any other one person?

Mr. TIPTON. That's right. While you might start out with at——

The CHAIRMAN. And more than the management. That's a consideration too.

Mr. TIPTON. You might start out with 2 or 3 percent with a definite program for buying 10, in which event, if you are going to do that, all this bill says is that if that is your program, to try to acquire that much, then you must inform the Civil Aeronautics Board by an application for approval, inform them that your program is to buy 10 percent of this company and get their approval.

That is all the bill says.

Senator COTTON. Whether they have 1 percent, 5 percent, or 20 percent, if their intention is to go in and remove the president and the management that would come within the purview.

Mr. TIPTON. That would be a pretty clear manifestation of control.

Senator COTTON. How do you know their intentions until they actually go into——

Mr. TIPTON. They ought to state it. This is the effect of existing law. If an aircraft manufacturer, say, decides he wants to throw out the management of an airline, then he has, under existing law, to go to the Civil Aeronautics Board and announce his intention to acquire control or enough control of this company to change the management and get their approval.

Senator COTTON. This bill simply extends the application of existing law to noncarriers and so forth?

Mr. TIPTON. That's right.

Senator COTTON. Thank you.

The CHAIRMAN. One question to clear this up. We know—we have some concern about foreign investments all over. Now, the foreign airline stocks are traded freely on our markets and I asked this question because I didn't know, and I think you answered it back there, but weren't on the stand. Our airline stocks are on foreign markets too, aren't they?

Mr. TIPTON. I don't know the answer to that. I should know the answer and I propose to get it very quickly and put it in the record here.

The CHAIRMAN. Could you do that? Because I think there is a policy problem here involving the whole business of balance-of-payment deficits, and international relations.

I'm not talking about one particular case. I'm talking about whether they do trade freely on our stock exchange.

Mr. TIPTON. One of the great virtues of this bill that is intended to be dramatized this morning by your questions has been that you do have, through the operation of this legislation, a much better check on foreign ownership of American-flag airlines than we have under existing law.

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That is one of the virtues of this bill.

The CHAIRMAN. We will ask the SEC what authority they have, if any. They testified here on Tuesday, but we didn't get into that question of whether they have to register a substantial block purchase from foreign countries, say, of an American airline or anything else. We will find that out.

Senator COTTON. In summary, you have testified that you favor this legislation, that is to say, you favor this bill, subject to some alterations which you will submit for the committee's consideration?

Mr. TIPSON. We will, and will do so promptly.

The CHAIRMAN. I hope you will do it as soon as possible.

Mr. TIPTON. We will do it promptly.

The CHAIRMAN. I know you have to look at this and I hope we will get a little more definitive word from all the airlines involved than you have right now.

Mr. TIPTON. Good.

Senator PEARSON. I have two questions.

First, we have been talking this morning in relation to people, prospective buyers of control. Yet as I read the bill—maybe the other sections of the act will cover this—it states that any person owning beneficially more than 5 percent shall make an annual report.

In the other section it says 5 percent. Does that require people now owning 5 percent to make the annual report and be subject to a CAB determination as to whether or not they are proper persons to even retain their stock in contrast to acquiring it?

Mr. TIPTON. The reporting provision, at the present time, section 407(b) requires an airline, the airline, to report on those of its stockholders who hold more than 5 percent.

Now that is a burden placed on the carrier. We have been doing it for years. The problem is, of course we are not always sure who owns our stock. The airline isn't sure who owns the stock and he has to just report who beneficially owns stock. He knows whose name is on the front of it.

Now this change here adds to that. The airline has to do it too. Then this says the stockholder has to do it too.

Senator PEARSON. I am not a prospective purchaser of stock. I own it now. Doesn't this bill affect me? Don't I now have to make an annual report? Am I not under the further section then presumed over a percentage point?

Mr. TIPTON. If you own the 5 percent or 10 percent or whatever it turns out to be and your report reveals that, then the process would have to be to determine whether your acquisition of that has already been approved—of course, it might well be—and if not, inquiry has to be made as to whether it needs approval. In other words, whether the presumption is actually effective. It operates as of right now.

Senator PEARSON. My question is this: We pass this bill as it is and I own more than 5 percent of an airline.

Now I am not going to acquire it. I already own it. Do I make an annual report to the CAB?

Mr. TIPTON. Yes.

Senator PEARSON. Suppose we leave the presumption at 5 percent here.

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Now am I presumed to have control of it and am I subject to review by CAB under this act?

Mr. TIPTON. Well——

Senator PEARSON. Let me carry it further.

If that be so, can the CAB require that I divest myself, if they find I am not a proper person——

Mr. TIPTON. That depends upon the effective date of this amendment.

Senator PEARSON. Make it any effective date. I own it now.

Mr. TIPTON. Yes, you own it now. You acquired it a long time ago. It depends upon how the effective date provision in section 2 of the bill is written.

Senator COTTON. But you have been talking about declaration of intent. A bank can report that we own 11 percent of the stock of X airline but we have an investment and have no intention of seeking to control the management of it.

Mr. TIPTON. They might well demonstrate that that doesn't give them control under all the circumstances.

Senator COTTON. Would they have to redemonstrate their good intentions or lack thereof each and every year?

Mr. TIPTON. Not every year.

Senator COTTON. It says annually.

Mr. TIPTON. Oh, that is the reporting. You just report it.

Senator PEARSON. But at one point it would be subject to review and determination of the Board.

Mr. TIPTON. That is right.

Senator PEARSON. Suppose I am the type of person that the Board would turn down if I sought to acquire it but I already own it. Under this bill would they have authority to require that I divest my ownership?

Mr. TIPTON. If it was demonstrated that your stock ownership previously held was controlled, the 10 percent or 5 percent——

Senator PEARSON. And against the public interest.

Mr. TIPTON. Yes.

Senator PEARSON. Then I would have to divest myself.

Mr. TIPTON. I think the Board would have the power to require divesture.

Senator PEARSON. Let me ask you this: Do you or your counsel have any question about the constitutionality of this bill? Heretofore the law said anybody could control an air carrier without CAB approval unless they fell into very specific classifications which are enumerated in the act and set forth in your statement.

But how we are going to include another classification. Everybody.

Now although there is judicial review from CAB determinations, what we are doing is having the CAB determine who may or who may not buy a given item and acquire ownership.

Mr. TIPTON. The application of the legislation will depend upon the effective date decided upon by the committee. That appears in section 2. They become effective March 7, it says here. All right. That date could be set last July or it could be set as far back as you care to put it. But it is that date that will determine how far back the Board goes.

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Senator PEARSON. I understand that. But what I am trying to develop to my satisfaction is whether we are adding another classification to those already enumerated and which added classification would be anyone who may acquire ownership of a stock. Anyone.

What we want to do is keep people or corporate entities or business entities from acquiring ownership in airlines which would be adverse to the public interest. That is pretty broad power and discretion.

You say now, for instance, gamblers shouldn't have it. Not convicted gamblers or anything else but gamblers shouldn't have it. I am just a bit concerned about that kind of——

Senator COTTON. Anyone would have to have a pretty big block of stock in any sizable airline if they had 10 percent. If, for example, the presumption stops there, then below it you don't have to indicate you are a good boy every year and have no intent to control the airline.

Mr. TIPTON. I would think not as far as the reporting requirement is concerned. As far as the constitutionality of the legislation and its application to a broader class, I wouldn't have any question about it.

Congress has often passed statutes which have required complete reorganization and divestures of—well, the Public Utility Holding Company Act of many years ago.

The CHAIRMAN. The point I think Senator from Kansas is making is if this bill is passed and becomes law, and anyone wants to go out and buy 4,000 shares of Pan American as a new purchaser or perhaps already owning 2,000 shares and wants to add to the investment, would everybody that does that have to make a report?

Mr. TIPTON. If it is over 5 percent. Only those over 5 percent.

The CHAIRMAN. So therefore we get back to the pesky problem of the percentage again, what to make it or not to have it at all.

Mr. TIPTON. As far as a reporting requirement is concerned, section 1, reporting requirement, that doesn't involve such great difficulties and we haven't been worried about the 5 percent. It is in existing law and it worked. It is the presumption provision where the percentage then gets——

The CHAIRMAN. In other words, you would say the bill shouldn't require reporting of small trading of shares back and forth but if it reaches whatever percentage we decide where the presumption arises, then they would have to register that or report it to the CAB, is that what you are saying?

Mr. TIPTON. That is right.

Now we know it is administrable because we are doing it now, only we have the burden of doing it now; anybody that owns 5 percent of a carrier's stock he has to report. I am now adding one very valuable provision which says the stockholder who owns 5 percent or more must take the burden of reporting too.

The CHAIRMAN. There is precedent for 5 percent. It may be a little bit not quite parallel but there is some parallel here. Where there is a public license involved—in this case there is of convenience and necessity—the FCC requires if anyone owns, or the company—to report who owns the stock in a television station if it is over 5 percent.

Mr. TIPTON. The same thing here.

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The CHAIRMAN. They have used the figure 5 percent down there. The Federal Power Commission requires, if they are going to give a license to a power company, they bring all the list of their stockholders in but the company brings it in, not the fellow that bought the stock. But he is listed. Maybe we might consider that CAB require some of this now.

I think they list their stockholders. They do it when they are over 5 percent now. I think that is where we got the figure 5 percent. They had a long list here Tuesday which they submitted for the record of certain airlines. One entity or one person owned a great deal of some of the airlines, particularly the local transport lines or the smaller lines.

Mr. TIPTON. The only change that is being made as far as the reporting requirement is concerned is to require the stockholder to do it too.

Senator COTTON. Did I understand you to say, or have you said in colloquy, that you preferred 10 instead of 5 percent?

Mr. TIPTON. My statement was that I wasn't clear even in my own mind yet as to whether it should be 5 or 10 percent and I wanted to talk to carriers further and try to make——

Senator COTTON. You haven't been able to talk to all the carriers involved and get their viewpoints?

Mr. TIPTON. That is right.

Senator COTTON. One other question.

Do you have any ideas for us about a holding company, such as where an airline establishes a holding company?

Mr. TIPTON. Where in effect the airline establishes a holding company, Mr. Chairman, of its own?

Senator COTTON. Yes; of its own.

Mr. TIPTON. I think that question is now pending as to whether that is an acquisition that is covered by the statutes and I don't know what the answer to it is.

Senator COTTON. I don't know; I will check, but I think there is an application or at least some intent filed before the CAB now of a very large airline in this country which wants to establish a holding company. Of course if it would do that, we would have to have them also report who owns the holding company or who has control of the holding company.

Mr. TIPTON. I know so little about that situation I better not try to comment on it.

Senator COTTON. I don't know either but this is a possibility. These lawyers can figure out a lot of things to get around certain laws.

Mr. TIPTON. We do the best we can.

Senator COTTON. But I don't think this bill will affect that situation. The CAB could handle that matter themselves as a matter of general policy.

Mr. TIPTON. This bill doesn't have any bearing on it, I think.

Senator COTTON. It seems to me some witnesses with the best intention in the world are reading a lot of sinister things into this bill which are not there.

Would you say that was correct?

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Mr. TIPTON. Yes. Certainly there isn't anything sinister about this bill and I think it can best be illustrated by the fact that Congress, years ago, said that you can't transfer an airline certificate from one person to another without the approval of the Board, but if you are a person not covered by existing law you can escape that provision by buying the whole corporation. It is not even an extension of congressional policy that has been established for years.

The CHAIRMAN. I had some queries because it affects my State. This bill has absolutely no effect on a proposal to take over an airline, such as the Hughes proposal to take over Air West. That is covered by the present law.

Mr. TIPTON. That is right.

The CHAIRMAN. CAB has to pass on that. I think the matter is pending now.

Mr. TIPTON. Yes.

The CHAIRMAN. Or a tender, an offer of tender to buy an airline control or the whole airline stock; that is covered by the law now.

Mr. TIPTON. That is not covered by existing law. This doesn't affect that kind of transaction at all.

The CHAIRMAN. All right.

Any questions?

Senator HANSEN. I have one or two more questions.

Possibly you have answered them and I just didn't discern the full thrust of your response.

Let me pursue just a little further the line of questioning taken by Senator Pearson and to pose this hypothetical question.

A person owning 5 or 10 percent or whatever limit which will eventually be spelled out in the bill, if it is spelled out, let's say that person has all of the attributes which would cause his application to be denied if he were applying for the right to purchase this stock, but bearing in mind that he already has ownership of this stock.

As I understand this bill, would it follow that he would be required first to disclose the fact of his stock ownership and secondly, would it follow that the CAB could ask him to divest himself of some of the stock or all of it if he——

Mr. TIPTON. He would have to report it. That we can set aside. He would have to report it.

Second, the CAB would have to review the situation, Mr. Hansen, if he acquired his control—if he acquired his control under the way it is stated now after March 7, 1969.

Senator HANSEN. Let me interrupt there to say that let's presume that he acquired control of this stock 5 years ago.

Mr. TIPTON. Then under the bill as it is written he would not have to have his control approved by the Board.

Senator HANSEN. And there is no way that this bill here could touch that individual though he may, in the opinion of the Board, be unfit or unable to—well, let's just assume he would be unfit.

Mr. TIPTON. That depends upon the date of the effectiveness of the statute, that the committee decides to adopt.

In the introduced bill we have the date March 7, 1969. Nothing to prevent the commitee from setting it March 7, 1968, or any other date.

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And if you state the date and acquisitions of control by this person would have to be—accomplished after that date would be dealt with by the Board.

The CHAIRMAN. Frankly we made it this date, retroactive to this date, to meet a certain specific situation but the date is open. We can continue.

Mr. TIPTON. The committee can make such determinations as it cares to make. On that we are not—I am not taking a position one way or another on it.

Senator PEARSON. I understand about the retroactive effective date of the bill, but I continue to believe that even if we left this effective date as it is, people owning stock 5 years ago or who acquired it 5 years ago would still have to report, would still be subject to the presumption and the hearing and the determination and a possible order of divestiture under the provisions of this bill.

Mr. TIPTON. I hadn't thought so. I had thought under these terms that while you obviously have to report, you do that every year, but if your acquisition of control—we are assuming here a case not covered by existing law. It is not covered by existing law. He acquired control 5 years ago.

Senator PEARSON. And he is the kind of person or entity which the Board would not approve of if he sought to acquire it——

Mr. TIPTON. Under the law as written, the Board could not act under those circumstances. I don't believe. I am doing an awful lot of legal opinions here——

Senator PEARSON. At least it is a question.

Mr. TIPTON. It is a question. Of course the committee can determine the scope of the bill in determining at what date is the effectiveness of this new provision to take place and the committee has very wide discretion in that area.

Senator HANSEN. I just might comment in response to that observation that while the committee might very well take it upon itself arbitrarily to insert an effective date in here, it would occur to me that in so doing it certainly could involve the question of the constitutionality of the legislation. I am inclined to feel that we can't pass legislation which would reach back into time—say 5 years ago—and bring a person into its application so as to make him answerable to a situation which came about several years later and which at that time insofar as the then existing law was concerned was not subject to question.

Mr. TIPTON. On the constitutional point, it is quite clear I think that from the standpoint of any criminal action against him, it would be unconstitutional but I note the provision in the bill here which says that transactions prior to the date of enactment, I believe—well, in any event prior transactions cannot incur criminal penalty which is quite clear.

Senator HANSEN. If I could interrupt at that point, isn't it true that you usually accomplish a purpose through the threat of imposition of a criminal penalty? You may say you shall divest yourself of the ownership of some stock but how do you accomplish that purpose if

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the fellow says I am not going to do it? Isn't it through the application of the criminal penalty or are there other ways it can be done?

Mr. TIPTON. Court orders and then you are violating the court order.

Senator HANSEN. I see.

That is all.

The CHAIRMAN. Any further questions?

All right.

We will recess subject to the call of the Chair.

(Whereupon, at 12 noon, the committee was recessed, subject to call of the Chair.)

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TO AMEND THE FEDERAL AVIATION ACT OF 1958

WEDNESDAY, MARCH 26, 1969

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee met at 10 o'clock a.m., in room 5110, New Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

Present: Senators Magnuson, Cannon, Moss, Cotton, Pearson, Hansen, and Baker.

The CHAIRMAN. The committee will come to order.

This is a continuation of hearings on S. 1373 which amends the Federal Aviation Act and the authority of the Civil Aeronautics Board to review acquisition of air carriers by noncarriers.

This morning we have the Assistant Attorney General Richard McLaren, Department of Justice, Antitrust Division, who has a statement. The Chair has a statement he would like to read on some thoughts about last Thursday's hearing, but I think I will wait until we hear from the Justice Department.

Mr. McLaren, we will be glad to hear from you.

STATEMENT OF RICHARD W. McLAREN, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.; ACCOMPANIED BY JOSEPH SAUNDERS, CHIEF OF PUBLIC COUNSEL AND LEGISLATIVE SECTION, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. MCLAREN. Members of the committee, I appreciate this opportunity to appear before you today to comment upon the problem of acquisitions of airline control and S. 1373 which is presently before this committee.

Here with me this morning is Mr. Joseph Saunders, Chief of the Public Counsel and Legislative Section, Antitrust Division of the Department of Justice.

The thrust of S. 1373 is to give to the Civil Aeronautics Board the power to veto acquisitions of air carriers by persons and firms not in or directly related to the aviation industry, in order to prevent acquisitions which may harm the public interest in air transportation.

The proposed legislation would amend section 408 of the Federal Aviation Act which presently requires prior Board approval of acquisitions of control of air carriers by another air carrier, another common carrier, or any person engaged in any phase of aeronautics.

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These amendments would increase the responsibilities of the Board so that it would no longer consider solely acquisitions between firms engaged in air transportation and in aeronautics, but also acquisitions of air carriers by companies in other lines of business—particularly by "conglomerates"—firms within whose corporate structure are joined many large, loosely related or diverse companies under one locus of control.

The great increase in the number and magnitude of conglomerate acquisitions has aroused deep and widespread concern here in Congress as well as in many executive departments and regulatory agencies charged with responsibilities with respect to key industries in the Nation's economy. As you may know, both the Attorney General and I have stated on more than one occasion that the Justice Department will act vigorously to insure that our national interest in effective competition throughout the economy is not compromised by mergers of this type. S. 1373 and similar bills such as S. 1398, which have been introduced to amend the Interstate Commerce Act appear——

The CHAIRMAN. May I say there are other bills introduced and what we have to do is take one bill as kind of a working paper? That is why we constantly refer to S. 1373.

Mr. MCLAREN. Right. These bills appear, at least in part, to be a response to the prospective impact of conglomerate mergers in the transportation industry.

I believe that the general objective of S. 1373 is desirable. The Civil Aeronautics Board should have the opportunity to make certain that the public's interest in air transportation is not compromised in the numerous multifirm corporate structures being rapidly created at the present time.

However, I also believe that the legislation must not prejudice broader efforts to preserve effective competition throughout the economy. The proposed bill creates dangers of such prejudice and may have unintended legal consequences of which the committee may be unaware. It is my hope today to make clear to you these dangers and possible legal consequences and to suggest specifically an amendment by which the objective of the bill may be preserved and by which, at the same time, such dangers and consequences may be avoided.

To achieve the objective of this bill and yet not prejudice broader efforts to preserve vigorous competition in the Nation's economy, it is necessary to take into account the fact that the acquisitions to be reached by the proposed bill are basically different from the acquisitions now subject to the Aviation Act. As I noted earlier, acquisitions between firms engaged in air transportation and in aeronautics are now required to be submitted for Board approval under section 408. Thus the Board is given control over corporate relationships in the aviation industry where the Board has continuing regulatory responsibility.

To facilitate Board regulation in the aviation indutsry, Congress provided that certain immunity from the antitrust laws would attach to transactions approved by the Board. The proposed bill, however, would deal with joinders between firms outside the aviation industry and firms within the aviation industry. Such joinders may have significant anticompetitive effects not only within the aviation industry,

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in areas subject to CAB control, but also in areas outside the aviation industry, in areas not subject to CAB control. Indeed, it may be anticipated that for some conglomerate companies which may be involved in such joinders, only a small portion of their activities would be in the aviation industry.

I have stated publicly that it is the intent of the Department of Justice to apply antitrust standards to meet threats to competition which may result from conglomerate mergers. Recently, I testified before the Ways and Means Committee of the House that conglomerate mergers may adversely affect the economy in numerous ways: By creating undue concentration of economic power in the economy; by diminishing the sources of new entry into important lines of commerce; by making new entry more difficult; by creating or enhancing dominant industry positions, with attendant inhibitions of rivalry from smaller firms; by creating reciprocity relationships with foreclose competitors, and in other ways.

Because acquisitions joining common carriers and noncarriers may have the kinds of effects I have just described, both within regulated industry and outside it, they pose special considerations both for the regulatory agency involved and for the Department of Justice. We think it is clear that the regulatory agency should be able to prevent those acquisitions it deems detrimental to the public's interest in the regulated services. We think it is equally clear that the agency's review and action, directed primarily to regulated industry concerns, should not preclude action to deal with the effects of transactions in industries outside air transportation under the statutory standards generally prevailing in nonregulated commerce, such as the standards of section 7 of the Clayton Act, the antimerger section.

Unfortunately, the present language of the proposed bill does not make this intent clear, and could give rise to claims of antitrust immunity in broad areas not subject to Board regulation.

S. 1373 would add to section 408 CAB authority to approve or veto direct and indirect acquisitions of control of air transportation firms by nontransportation companies. Existing section 414 provides that any person affected by an order under section 408, and other sections, shall be relieved from the operation of the antitrust laws, and all other restraints and inhibitions of law, "insofar as may be necessary to do anything authorized, approved, or required by such order." Thus, if the Board were to authorize an acquisition of control or an air carrier on the grounds that it saw no harm to air transportation in the acquisition, the acquiring company might contend that the antitrust laws could not be applied to any aspect of the transaction, even though it would have substantial anticompetitive and harmful effects outside air transportation.

Allow me to give you some illustrations of the problem. If a hotel chain were to acquire control of an air carrier with Board approval and then another hotel chain were to apply for CAB approval of acquisition of control of the first hotel company, thereby indirectly gaining control of the air carrier, S. 1373 would require that such a transaction receive CAB approval. Board approval of the second acquisition could give rise to a claim that the Board had immunized from the antitrust laws the joinder of the competing hotel chains.

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Also, an acquisition of an airline by an oil company, or by a food preparation firm, might have no adverse effects in air transportation but might have the effect of prejudicing the competition of other oil companies or other food companies for the substantial purchases made by the air carrier. Yet, the acquiring company might contend that CAB approval of its acquisition of the air carrier on the grounds that no adverse effects in aviation were apparent would preclude inquiry under the antitrust laws into the anticompetitive effects of the transaction in the oil or food processing industries.

These problems are magnified when large and diverse conglomerates are involved. To give you a concrete example, one of the major conglomerates, which has current gross sales of over $3 billion a year, has acquired 33 corporations since 1961, and has at least five subsidiaries with gross annual sales over $100 million engaged in such disparate areas as meatpacking, sporting goods, wire and cable manufacturing, aerospace products, and electronics systems. This company also happens to control an air carrier. The gross annual sales of this air carrier are approximately 8 percent of the total gross sales of this conglomerate. Yet, if a firm which directly or through subsidiaries engaged in the same line of commerce as one of the conglomerates subsidiaries, for example, meatpacking, were to merge with this conglomerate, and if it were the surviving corporation, the transaction would under the proposed legislation be subject to the approval of the Board, and, if approved, arguably immune from prosecution under the antitrust laws. Accordingly, the Department of Justice might be prevented from challenging the effects of this transaction although it might have clear and perhaps significant anticompetitive horizontal effects in the meatpacking or other industries.

Nor is this example of an air carrier being owned by a major economic power an isolated one. The largest supplemental air carrier is a subsidiary of a major insurance firm; another of the largest supplemental air carriers is controlled by a firm with over $3 billion in assets, and total annual gross revenues over $1 billion; and a third supplemental is owned by a major real estate development firm. The possibility cannot be ignored that such diversified firms controlling air carriers might attempt to merge and claim immunity from the application of the antitrust laws as to effects in nontransportation markets if the CAB were to approve the transaction.

We do not think it is intended that this legislation, or existent aviation legislation, allow these results. Legislation providing authority for the CAB to approve and immunize from the antitrust laws transactions having substantial anticompetitive effects outside air transportation would be inconsistent with the need to maintain a consistent antitrust policy throughout the unregulated sectors of the economy. Under such legislation anticompetitive effects outside the air transportation industry either would receive no scrutiny at all or would be considered only by an agency with no experience in, or responsibility for the maintenance of competition outside of air transportation. Moreover, even if the CAB did scrutinize the competitive effects in other markets it would do so under a "public interest" standard of the Aviation Act. The result would be the application of different

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legal tests to transactions having identical effects in nontransportation markets, depending on whether an air carrier was collaterally involved.

The advancing wave of conglomeration has produced corporate relationships not envisaged at the time the Civil Aeronautics Act was passed in 1938, and makes plain the necessity for a clear definition of responsibilities as between the regulatory agency, with respect to regulated air transportation, and the Attorney General and the courts, with respect to regulated air transportation, and the Attorney General and the courts, with respect to nonregulated lines of commerce.

This may be achieved by amending S. 1373 to make it clear that antitrust jurisdiction remains to deal with transactions which involve air carriers but which have adverse effects outside of the air transportation industry. This amendment would add at the end of section 414 a new subparagraph stating as follows:

Provided, however, That no order of approval shall relieve from the operation of the antitrust laws acts, practices, or transactions which violate the antitrust laws with respect to any line of commerce other than transportation.

Such an amendment would assure surveillance of air carrier acquisitions by conglomerates both from the standpoint of the Board and the Department of Justice. It would also serve to clarify what we have traditionally regarded to be the separate and yet complementary roles to be played by the two agencies is fostering the safe and sound development of our regulated air transportation system and the preservation of competition in the unregulated spheres of our national economy.

We understand that the Civil Aeronautics Board is concerned that amending section 414 as we have suggested might have unforeseen effects with respect to air carrier agreements, and, possibly, other matters. However, we believe that the language we propose is essential to mark a clear and appropriate delineation of responsibilities between agencies which is necessary and desirable in the light of current developments in the area of industrial organization, and experience with the administration of the Aviation Act. If, notwithstanding our view of this matter, the committee wishes to limit its action to mergers, acquisitions and other transactions covered by section 408, the amendment of section 414 may be limited, as follows:

Provided, however, That no order of approval under section 408 of this act shall relieve from the operation of the antitrust laws transactions which violate the antitrust laws with respect to any line of commerce other than transportation.

If S. 1373 were amended as we propose, the Department of Justice would support its enactment.

The CHAIRMAN. Thank you, Mr. McLaren. I think you have made a contribution to the very complex problem involved here.

On the last page you mentioned the different roles between the two agencies. You use the words "regulated air transportation system." Do you mean you would only apply S. 1373, with or without the amendment, to the regulated carriers and not the nonscheduleds?

Mr. MCLAREN. We did not mean to make that distinction.

The CHAIRMAN. We are talking about air transportation, the whole business?

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Mr. McLAREN. That is right.

The CHAIRMAN. With some limitations. Well, developing helicopter service and air-taxi service and things of that kind, and some of the nonscheduled airlines are now under the CAB?

Mr. McLAREN. That is correct.

The CHAIRMAN. I did not think you wanted to get into that phase, to try to define what is air transportation.

Mr. McLAREN. No, indeed, we did not mean that fine a distinction there, Senator.

The CHAIRMAN. I think when you talk about "air transportation," that is something the Board is going to have to define, the CAB.

Mr. McLAREN. Actually, Senator, we have said "other than transportation" here because the sections of the act do deal with carriers other than air carriers in certain respects, and so we thought we would make this coextensive and consistent.

The CHAIRMAN. What you are saying, in effect, is that you would not want to have any cooling down or jeopardize the action of the Justice Department just recently taken this week where you are dealing with a company that owns Jones & Laughlin Steel that also is involved in an airline?

Mr. McLAREN. That is correct, Senator.

The CHAIRMAN. But as you point out, it is only about 8 percent—and we never did have the figures—of the gross that comes from the airline, whereas the conglomerate is involved in all kinds of other things?

Mr. McLAREN. That is true. Basically we are saying here that in trying to deal with this conglomerate situation, let's not punch a loophole in the antitrust laws.

The CHAIRMAN. In this particular case—and we all know who it is—if the CAB would have to review the acquisition of the airline or the amount of stock they have in the airline, the fact that they said that looks all right for air transportation should not jeopardize the Antitrust Division in saying: "Yes, but look at the rest of it"?

Mr. McLAREN. That is right, sir. That is our concern.

The CHAIRMAN. Maybe I oversimplified it, but that is what you are trying to say?

Mr. McLAREN. That is our concern.

The CHAIRMAN. The action taken Monday or so is exactly what I think Congress is thinking about in the whole question of conglomerates all over and the concern of the people in the economy.

You mentioned a large supplemental air carrier, a subsidiary of a major insurance firm. This is a problem that could happen in lots of cases, and could happen with necessity because so many airlines in buying equipment have had to borrow money from insurance firms and other places, bond issues, to keep up with the equipment race. I can see down the line that if something should happen to the air transportation industry, one company through a foreclosure might assume control of the company, and it may be a nontransportation group. This could happen easily because air carriers have had a terrific problem keeping up with equipment and the cost of equipment and therefore they have borrowed a great deal of money.

I don't see any effect that they haven't been able to, with the growth of air transportation, to meet their payments and pay it back and

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pick up their debt. I think it is in very good shape. But there could come a time when we have to look at that problem.

Mr. McLAREN. That could be.

The CHAIRMAN. You think your amendment would take care of the example you give about one hotel chain taking over another hotel chain, but with that comes a certain substantial interest in an airline? Do you think that would take care of it?

Mr. McLAREN. Yes.

The CHAIRMAN. Because you would be dealing not with what the CAB would have to: Is this in the public interest for the hotel chain to own a certain portion of an airline? But you would be dealing with the amendment if it was put in, with whether the two hotel chains were lessening competition in the hotel business. Would that be correct? And not what they did with the airline.

Mr. McLAREN. We would not delimit the CAB's authority in any way, but we would be limiting, via our proviso, the immunity that might otherwise attach.

The CHAIRMAN. It might arise and might not. And it might be a good thing all the way around, but only as it relates, not to air transportation, but to the other?

Mr. McLAREN. This is correct.

The CHAIRMAN. Senator Cotton.

Senator COTTON. I want to be sure I understand the difference between the two amendments that you call to our attention.

One of them directly amends section 408 of the existing law. The other indirectly amends it but leaves 408 intact. That is poorly expressed, but will you straighten me out on that, please?

Mr. McLAREN. Yes, Senator. The first form of amendment to section 414 would amend the basic immunity provision to make it clear that orders of the CAB immunize transactions from the antitrust laws only in the case of transportation, and this would apply to other orders as well as to merger orders.

The second alternative we suggested would also amend section 414, but it would limit to transportation firms the immunity, and only as to orders issued by the CAB under section 408. Do you follow me?

Senator COTTON. Yes, I follow you. But the purpose of the bill before us, for instance, does not involve a merger.

Mr. McLAREN. I believe it would cover an acquisition, or a merger.

Senator COTTON. The case that triggered off the consideration of this bill does not involve a merger. Would an amendment that only has to do with mergers—that is, that says that only in the case of mergers can the antitrust laws be immunized or be furnished against antitrust suits—would not that be sufficient?

Mr. McLAREN. I did not really adequately state that, Senator. This second proviso would amend section 414 to provide that the immunity given as a result of any order under section 408—and that would be mergers, acquisitions, obtaining of interests less than a total interest and so on—anything that is approved under section 408, our limitation on the immunity to the transportation field would be limied to that type of order.

We prefer the first proviso which says generally, and I think this is consistent with the legislative history of what was originally in-

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tended in adopting section 414, that its immunity would apply only in air transportation.

Senator COTTON. You say that you understand that the CAB has testified—and I do not recall all their testimony—that it would object to the first amendment that you have offered and that it is worried about it?

Mr. MCLAREN. They are concerned it might be too broad. I am not sure I understand their concern because my understanding is, that they do not claim to be able to give immunity, as a result of their orders outside the field of transpotration.

Senator COTTON. But you would prefer the first to be the second?

Mr. MCLAREN. Yes, sir; we would. We think it clarifies the relationships of the agencies generally under the statute, and would apply in merger and acquisition fields, as well as in other areas. We do not know what developments may come as side effects of this conglomerate situation, and we think that this really in no way detracts from the CAB's effectiveness or their power, and it makes very sure that we are not inadvertently creating an antitrust loophole of some sort.

Senator COTTON. Even though I am only a country lawyer, I know that lawyers do not like to give off-the-cuff advice on matters they have not studied——

The CHAIRMAN. Be careful when they introduce themselves that way.

Senator COTTON. Without needlessly prolonging this and taking time away from my colleagues, you will note that the bill appears to provide that 5-percent ownership of the stock of an airline at least creates a presumption of control. There has been some conflicting testimony on this point and many witnesses have suggested 10 percent instead of 5 percent on the ground that the latter is too small.

What I would like to ask you is this: If any particular percentage of stock ownership is written into this bill, then it automatically puts the burden on the CAB to move even though nobody has complained. That would be true, would it not?

Mr. MCLAREN. I believe it would, Senator. They would receive reports from people holding 5 percent or more, and if this changed, they would have to take a look at it.

However, I am sure there are degrees of the look that they would have to take, the thoroughness with which they had to look at it.

Senator COTTON. Do you think that in the public interest it is necessary to make it automatically incumbent upon the CAB to get into these cases when nobody complains, not even a minority stockholder?

Mr. MCLAREN. Senator, I really do not have a view on that. I would defer to the CAB people on it and whether they thought it would be burdensome.

Senator COTTON. That is one reason I am interested in these questions, because the chairman of this committee and I happen to be on the Appropriations Committee, and in the CAB's testimony there appeared the rather pointed suggestion that with passage of this act they might require more personnel. It seemed to be a warning that if we passed this bill, we would have to give them some more money.

I am wondering if anything is gained by writing into this bill any percentage that will create a presumption of control. In other words, if

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no percentage were written into this bill—and I am now talking to you in your legal capacity and asking you to give us some advice—but simply a requirement that the CAB to move upon complaint to insure enforcement of other provisions, would this not be just as effective? Also, wouldn't it avoid creating another burden on the CAB such as chasing rabbits all over the lot to enforce this act?

Mr. McLaren. My feeling is, Senator, that they could cut fairly short their inquiry once they took a preliminary look at the situation after it was triggered by the 5-percent level. But without the 5-percent presumption it might require a very deep and involved inquiry to establish by evidence that somebody did have control, say, with 7 or 8 or 9 percent.

If you have the presumption and you find adverse public effects, it seems to me then you can move on it without spending a lot of time investigating whether or not in fact there is control.

Senator Cotton. In other words, you would approve of a figure, whether it be 5 percent or 10 percent?

Mr. McLaren. I think I would offhand. I really have not studied it, Senator, but my feeling is that the stakes are pretty high here and perhaps a little extra workload in having to look at a few transactions which you do not have to pursue might be very well worthwhile.

Senator Cotton. Perhaps I am still trying to push you into answering matters you have not carefully studied or have not had the opportunity to study. However, do you have any preference as between 5 percent and 10 percent of stock ownership for the presumption of control?

Mr. McLaren. My feeling is that 5 percent at that level can, in a large company, be very close to working control; although the courts have not actually held it. Three or four interests of about 4 percent each can very well be a working control although not affiliated or in the same hands.

Senator Cotton. I have one other quick question. As this bill was drawn, it has a retroactive provision. I understand the committee may be requested to move this effective date back to an even earlier date. What would be your observations concerning this issue of retroactivity?

Mr. McLaren. I see no particular reason why it should not be made retroactive if the committee sees fit to do it that way. I take it that it would be retroactive to the date of introduction, when people were put on notice. Of course, there would not be criminal penalties attaching, but I do not really see why it could not be retroactive.

Senator Cotton. Thank you, Mr. McLaren.

Thank you, Mr. Chairman.

The Chairman. After last Thursday's hearings, we told the staff to make inquiry of the CAB as to how they viewed the language of the bill as well as their own suggested text with relation to this issue of retroactivity. I will place in the record at this time a copy of a letter I received from the CAB which states generally that if the stock was acquired prior to the effective date of legislation, which would be March 7 in the bill we have introduced, then hearing and approval by the Board would not be required. On the other hand, if a contract right to acquire a percentage of stock which would be presumed controlling

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under this legislation was acquired prior to the effective date but not exercised until after the effective date then the legislation would be applicable. In short, the Board is saying that the legislation would be prospective in application from whatever effective date was specified in the bill and would not affect acquisitions completed prior to the effective date.

Senator PEARSON. Mr. Chairman, is that their view under the current language of this bill?

The CHAIRMAN. Yes, and we will put the letter in the record in full.

(The letter referred to follows:)

CIVIL AERONAUTICS BOARD,
Washington, D.C., March 25, 1969.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: During the hearings on S. 1373 I submitted for the Committee's consideration a draft bill incorporating various suggestions which the Board felt would make for sounder administration from its standpoint. A member of the Committee's staff has now informally requested a statement from the Board on whether the Board's draft would have any retroactive application. Specifically, as I understand it, the questions are whether, if the Board's draft were enacted, (1) an application and Board approval would be a condition precedent to the continued holding of the prohibited quantum of stock which was acquired prior to enactment, and (2) an application and approval would be necessary in a situation where, prior to enactment, an unconsummated contract had been entered into for acquisition of the prohibited quantum. In our opinion, the answer to the first question is no, and to the second, yes.

It was not the Board's intention in drafting its bill to require persons already holding the prohibited quantum to apply for and obtain approval from the Board under Section 408 in order to continue to hold it. The provision in terms is prospective. Furthermore, as a general legal principle, retroactivity is not favored, and in the absence of a clear showing of a contrary legislative intent, statutes imposing new prohibitions are to be construed as having prospective effect only. Thus, not long after enactment of the Civil Aeronautics Act of 1938, the Board for these reasons held that an application and Board approval was not required under Section 408 with respect to relationships within its terms which antedated enactment of the statute. *Railroad Control of Northeast Airlines*, 4 C.A.B. 379, 386 (1943). The Board's construction was approved by the Supreme Court in *Pan American World Airways* v. *United States*, 371 U.S. 296 (1963). The Board would similarly construe its draft should it be enacted, unless the committee reports and other legislative history clearly reflected a different intent. Of course, if S. 1373 were enacted, the provision making it retroactive to March 7, 1969, would almost conclusively indicate that retroactivity beyond that date was not intended.

The fact that approval under Section 408 would be necessary in cases in which the prohibited quantum of stock was acquired prior to enactment does not necessarily mean, however, that the Board would be powerless to reach the newly-prohibited relationships which antedated the enactment. In the *Pan American* case, *supra*, notwithstanding that Board approval under Section 408 was not required with respect to relationship antedating enactment of the statute, the Court held that such a relationship and the activities to which it gave rise "may be so disruptive of the regime visualized by the Act or so out of harmony with the statutory standards for competition set out by the Act that it [the relationship] should be undone by proceedings under Section 411," the section prohibiting unfair competitive practices. Thus, despite the lack of retroactivity of the amendment of Section 408, it may be that in some circumstances the Board could require divestiture of preexisting holdings covered by the amendment should they lead to practices which violate other provisions of the Act.

This brings us to the second question. If on the date of enactment there were outstanding an unconsummated contract under which a person could acquire the specified percentage of stock, or incerase his existing holdings to that percentage,

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it would be the Board's position that approval under the amendment would be required before the contract could be consummated. This conclusion is based upon the assumption that under the terms of the contract an "acquisition" has not taken place as of the date of enactment. Close questions could arise as to the precise time that an "acquisition" actually occurs. This is a matter which would have to be decided on a case by case basis.

I hope that the foregoinng adequately responds to the questions presented.

Sincerely,

JOHN H. CROOKER, Jr.,
Chairman.

The CHAIRMAN. And then one other thing. There was some confusion at the last hearing as to whether foreign interests can purchase stock in American flag air carriers on foreign stock exchanges. The CAB has advised informally that foreign exchanges do not list U.S. air carrier stocks but that foreign purchases can be made by placing an order through a foreign brokerage firm which then arranges for the purchase. So it would be pretty hard to trace it in some cases.

And then the third point that we wanted to clear up: The SEC advises informally that the 10-percent ownership disclosure requirement enforced by the Securities and Exchange Commission is applicable to any purchaser of 10 percent whether he is a domestic or foreign purchaser. They use as a rule of thumb the 10 percent. How they arrived at that I just do not know.

Let me ask one quick question. On an antitrust suit when you deal with the question of control, is there any rule of thumb down at Justice Department on percentage? Or do you take it case by case?

Mr. MCLAREN. That is right; it is case by case. And that frequently gets into quite a determination of who owns how much and where the influential people in the company get their influence. This is why I think perhaps a specified number raising a presumption of control might save the CAB a lot of time and trouble.

The CHAIRMAN. And it involves, I suppose, interlocking directorships and things of that kind; it all adds up to a package.

But it is my understanding that on the antitrust suits the Department has always had the policy that it is a case by case thing and every case is different.

Mr. MCLAREN. That is correct, sir.

The CHAIRMAN. Which they still adhere to as far as I know.

Senator Cannon?

Senator CANNON. Do you understand the statement there from the CAB to mean that they woulld have the jurisdiction to review any case that occurred after the date that we set as the effective date?

Mr. MCLAREN. I take it they were distinguished between the acquisition date of stock and ownership of stock; and hey were apparently taking the view that they would review this control situation based on the acquisition date; and that if the acquisition date or contract was before the effective date, they would probably not look at it.

Senator CANNON. And the effective date would be whatever date we fixed in the act itself?

Mr. MCLAREN. That is the way I understood it; yes, sir.

Senator CANNON. You said earlier, I believe, that the effective date could be made retroactive?

Mr. MCLAREN. I think that is correct, Senator. I believe that the one bank holding company bill has been looked at very carefully by

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the administration, and I believe that there is a retroactive provision there.

Senator CANNON. So if we wanted to be sure and take a good look and expand the Justice Department's authority in this case, all we would have had to do is, make the effective date the same as that of the Civil Aeronautics Act of 1958, right? In other words, if we made this effective as of the same date as the act, then you would have the same authority to go back if we adopted your amendments, and the Board would have the same authority to go back to the date the act was enacted; is that right?

Mr. MCLAREN. I have not researched that, Senator. I think since it is procedural that that would be permissible; and also, since we think it is clarifying, it would be a confirmation of existing law. I think that that probably would be effective; yes, sir.

Senator CANNON. You say it would be a confirmation of existing law? Would not both of these amendments actually expand the present authority of the Justice Department?

Mr. MCLAREN. Well, the present immunity provision we have read in a fashion consistent with the legislative history, and that is that it applies exclusively to air transportation. However, there is a court decision in which the immunity provision was interpreted more broadly, and we think it was erroneously decided.

Senator CANNON. Is that a case where the Justice Department brought an antitrust suit that presumably had fallen within the section 414?

Mr. MCLAREN. No, Senator, it was a case in which a noncarrier in aeronautics was acquired by a carrier, and litigation resulted by reason of another aeronautical firm intervening, complaining, and ultimately appealing from it. The Board's ruling on it was upheld, that the immunity applied although the acquisition was of an aeronautical firm, not a transportation firm.

Senator CANNON. I see. So that the Justice Department has never proceeded under a case under section 414?

Mr. MCLAREN. Not that I know of.

Senator CANNON. Have there been any instances that you are aware of, that the Justice Department would have liked to have proceeded, had it not been for section 414?

Mr. MCLAREN. I do not know of any, Senator. I am sure, in view of the position of the Justice Department that the immunity provision was designed only to relate to transportation, that the Department would have gone ahead and tested the thing out.

Senator CANNON. Well, then, actually if you have never had occasion to test it, and you believe you would have tested it had you deemed it advisable, why are you requesting the Congress now to expand your authority clearly beyond that that you already have?

Mr. MCLAREN. Well, first of all, the bill would bring a whole new class of transactions within the CAB's authority, transactions involving firms not engaged in transportation. I think that the present bill would cast considerable doubt on our jurisdiction and on the application of the antitrust laws if it is adopted; and we also did have this one case that I mentioned where the ruling went against us, although we did intervene and file a brief in the matter and set forth our views

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We think that this is a good opportunity not only for the Congress to guard against creation of a loophole in the antitrust laws but also to confirm that the original intention and the intention now is to confine the immunity to the transportation field.

Senator CANNON. If the Congress passed this bill, then everything would be covered under section 408; is that correct?

Mr. MCLAREN. If Congress passed this bill as it is now, it would.

Senator CANNON. S. 1373 as it now is. Then all forms of acquisitions then would come under section 408? In other words, subject to Board approval?

Mr. MCLAREN. That is right. We are afraid that it would be interpreted to give immunity to nonair transportation aspects of Board approval under 408 because approvals under 408 are immune under 414.

Senator CANNON. Then your second alternative is a less desirable one as far as you are concerned, because you then would simply tie that into section 408 itself and not to the exemption under 414?

Mr. MCLAREN. That is correct. We think it is less desirable for us because it would be so limited.

Senator CANNON. Do you think it is advisable to have a distinction in the bill here such as has been discussed now of a notice to the Board at the 5-percent level, and then some other level for a presumption of control? That is, a 10-percent level such as Senator Cotton mentioned to you a few moments ago?

Mr. MCLAREN. As I say, I have not really studied that. But it does seem to me to be consistent, and it might just as well be consistent, to have reports coming in from carriers as to who controls 5 percent of the stock, have reports by stockholders that they do have control of 5 percent or more, and then have the presumption also be at the 5-percent level. It seems to me that there is no good reason to have it any differently, I will put it that way.

Senator CANNON. But that would certainly be a rebuttable presumption?

Mr. MCLAREN. Oh, yes. Oh, surely.

Senator CANNON. Do you recall any cases where you have had a substantial percentage that was found not to be controlling? Ten or twelve or fifteen percent, something of that order?

Mr. MCLAREN. I do not recall any, Senator. I believe that the figure in the *Du Pont-General Motors* case, which the Supreme Court thought was significant, was about 18 percent.

Mr. Saunders advises me that in some ICC cases they have found control around the 25- to 30-percent level.

Senator CANNON. In the event that the committee should decide not to take any action on S. 1373, is it still your position that you would like to have an amendment to cover section 408?

Mr. MCLAREN. We would like our first proviso. I think it would be a good clarifying amendment, because our basic position is, and will continue to be, that Board immunity should attach only in the transportation field. And I think that our proviso would clarify that.

Senator CANNON. So you would really like the proviso on section 414? You prefer that?

Mr. MCLAREN. Yes, sir.

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Senator CANNON. If we determine not to take any action at all on S. 1373?

Mr. MCLAREN. You understand, Senator, both these provisos are amendments to 414, but one of them would confine it to section 408 orders, the main one we would want to be unlimited, to say that CAB orders give immunity only in the transportation field. We think that is what Congress intended in the original act and we would like to see that reconfirmed now.

Senator CANNON. Thank you, Mr. Chairman.

The CHAIRMAN. I want to point out to the Department of Justice that we are dealing here with the air transportation, but there are bills introduced in the committee, on which we will hold some very early hearings; I don't know just when. The Senator from Indiana is ready to set the dates. But this whole thing spreads to surface transportation. So we are going to have to clarify a lot of these matters as they affect all forms of regulated transportation. So the ICC will be involved. I am not too familiar whether they have the same authority as section 408 gives the CAB. I think they do.

Mr. MCLAREN. We have a similar problem there too, and we will be happy to present our views.

The CHAIRMAN. I know you are conscious of it and want to be helpful.

Mr. MCLAREN. Yes.

The CHAIRMAN. Then there have been some mumblings, at least around here, that the FCC may have a similar problem.

Mr. MCLAREN. I think that is correct, yes. To the extent that these bills go in the same direction as S. 1373, we will be happy to present our views, Senator.

The CHAIRMAN. Thank you.

Senator Pearson?

Senator PEARSON. Thank you, Mr. Chairman.

Mr. McLaren, I am concerned about the retroactivity aspect of this particular bill. But we have been through that and I think Senator Cannon really cleared that up substantially.

There is one other thing that bothers me about this bill, and that is that under section 408 you need prior approval of the CAB for acquisition of stock if it is another air carrier or common carrier or anyone connected with aeronautics. We are adding a new classification now. And the only guideline in relation to that new classification which involves everyone now is whether it is in the public interest. There is no more; no other guidelines; no other measurement. The CAB in its judgment—its judicial judgment I guess you would say in administrative law—can make a determination only on the basis of public interest.

Does that raise a legal problem in your mind as to any possible constitutional issue?

Mr. MCLAREN. I do not think it does, Senator. I think the public interest has been interpreted by the Supreme Court. For example, in our particular field, it is taken to include the public interest and maintaining and preserving competition. I am certain that if a particular acquisition came up and it involved control of an important American carrier going to foreign interests, that the CAB would be entitled to consider the propriety of that in our public interest.

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I think that the public interest in the administrative field really is a very sound standard.

Senator PEARSON. And is the standard good enough to avoid an arbitrary or capricious type judgment by the CAB?

Mr. MCLAREN. I think so. Of course, it is always subject to appeal, and the Supreme Court ultimately can review whether or not in their view it is in the public interest.

Senator PEARSON. That is what I am thinking about, judicial review.

Now I put to you the case—not of a foreign carrier or foreign nation acquiring control, the firm which is part of a conglomerate to which you have directed most of your attention—of just individuals who may seek ownership who are by reputation people who may be associated with the underworld, although having no convictions, but simply associated by reputation or common knowledge, such as those who may be engaged in gambling enterprises or other like activities. Do you believe the Board's decision under those circumstances would be able to stand up in a judicial review measured only by the public interest?

Mr. MCLAREN. I think they would need some very solid evidence. They certainly could not prevent someone from taking control of a carrier on the rumor that he was connected with the underworld. It would take evidence, and I would think it would take some basis in a record to indicate that there would be injury to the public interest, whether by reason of injury to weakening the air transportation system, I think you would have to have——

Senator PEARSON. We are really talking about discretionary judgment, albeit a judicial judgment in a sense.

Mr. MCLAREN. That is true, except as I said, the Supreme Court has laid down pretty good guidelines on the public interest. Then you also have section 1302 of the act, 49 U.S.C.A. 1302, which does lay out the items of public interest which the Congress has laid down for the Board to consider. These are specific things that have to do with air transportation, its soundness——

Senator PEARSON. Pardon me. Would they be applicable to section 408 as amended by this bill?

Mr. MCLAREN. I think without doubt it would, Senator. It says that the Board shall consider the following, among other things, as being in the public interest and in accordance with the public convenience and necessity, and then——

Senator PEARSON. Then would you read on? I would be very interested. Or, if you wish, summarize.

Mr. MCLAREN. Well, subsection (a) has to do with the encouragement and development of an air transportation system for the present and future needs of the country and of the national defense. Subsection (b), Regulation of Air Transportation, is to recognize and preserve the advantages and foster sound economic conditions and improve relations between carriers and coordinate transportation.

Subsection (c), promotion of adequate economical and efficient service at reasonable charges without unjust discrimination and undue preference or advantages or unfair or destructive competitive practices.

And (d), competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the

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needs of the foreign and domestic commerce in the U.S. postal service and national defense.

Subsection (e) is promotion of safety; and section F is the promotion, encouragement, and development of civil aeronautics in general.

Senator PEARSON. Do you interpret these to be items of limitation in relation to what is in the public interest?

Mr. MCLAREN. No, no. It specifically says: "The Board shall consider these things, among other things." And then they make take into account—and I suppose it is touching on another matter of fairly general knowledge, it has been in the public press—whether or not it is appropriate for persons that are primarily interested in gambling casinos to be controlling an important carrier.

I should certainly think the CAB can consider that particular matter in connection with the soundness, the financial responsibility, and so on, that they want to find in the controlling group in an airline.

Senator PEARSON. I thank you. I think this helps me a great deal on a matter that concerns me.

I thank you, Mr. Chairman.

The CHAIRMAN. Senator Moss has gone.

The Senator from Wyoming, Senator Hansen.

Senator HANSEN. Thank you, Mr. Chairman.

Perhaps the question that I have in mind may already have been asked. I regret that it was necessary to step out for a few minutes.

I understand that Senator Cannon had suggested making the effective date of S. 1373 the same date as the enactment of the Federal Aviation Act, which is 1958.

Senator CANNON. If the Senator would yield?

I did not suggest it. I raised that possibility. I was just getting it out into the discussion arena. I am neither opposing or proposing at the moment.

Senator HANSEN. Thank you very much, and I appreciate having the correct position of the Senator stated.

Then if I may, what was your response to this hypothetical question insofar as the constitutionality of the issue is concerned? Can the Congress constitutionally provide that there could be an ex post facto review going back, say, to 1958 insofar as the ownership and control of an airline is concerned?

Mr. MCLAREN. I do not know just how far you can go back with it, Senator. As far as the criminal side of the thing is concerned, I do not think you can go back. I do not think we can do that constitutionally.

I think that certainly within reason you can go back—and I know that in developing the one bank holding company bill which has just been offered, I understand that that has a retroactivity provision in it, and I believe that that was very carefully considered. I should think that Congress could, insofar as this particular matter is concerned, put in here a provision for divestiture of interests obtained before the date of the bill. Your precedent for that would be your Public Utility Holding Company Act of 1935.

Senator HANSEN. Thank you, Mr. McLaren.

I have one other question, Mr. Chairman.

We have heard a lot of talk about the possibility of gambling interests gaining some degree of management or control over an airline.

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I guess this raises this specter of something sinister or evil. I am assuming now that there is no question raised as to the legality of a gambling operation in the State of Nevada. I assume that is right, basically.

What is the rationale behind this concern? Maybe I should let you answer that first.

Mr. McLaren. I think that the Board can consider the legality question and I take it, as you say, there is no question of the legality of gambling in Nevada. I think that they can consider other aspects of the relationship and whether they want to see it in the airline industry.

I think that they also may want to consider to the extent to which an airline might be run as an airline, for the purpose of running an airline, and the degree to which it might be run as an adjunct of hotels and gambling casinos.

Senator Hansen. Then on the face of it, would I be correct in assuming that the ownership of whatever stock in the opinion of the CAB may constitute some degree of control or management by persons or individuals associated or interested in a gambling operation would not of itself be sufficient reason to deny this sort of ownership or to take steps directed toward this divestiture? Rather, it would require a demonstration that the management in control of the airline, as would flow from the ownership of a substantial portion of the stock by someone or some entity, impaired or thwarted the service to the public to serve some other purpose and at that moment you would have a right to assert some concern. Is this a fair statement?

Mr. McLaren. I think that we get back here again to the question of the public interest, and each case would be considered and all these factors would be weighed. The concern that the Board might have with the gambling aspect of the thing; the concern they might have that the airline might not be run fairly and properly as an airline but as a come-on for bringing people in to gamble in competition with other airlines that are serving greater areas perhaps, but partially in competition with that airline; there would be a great many things to consider. I take it that this is why we probably have an administrative agency like this and broad standards for it to apply because there are a great many things to be taken into account. The ultimate decision is whether or not it is in the public interest.

Senator Cotton. Will the Senator yield?

Senator Hansen. Yes, sir.

Senator Cotton. In other words, if the CAB started going into the moral character of everybody who controlled an airline, it would be an awfully busy Board, wouldn't it?

Mr. McLaren. They sure would.

Senator Hansen. I do not have any further questions, Mr. Chairman.

The Chairman. Senator Cannon?

Senator Cannon. Mr. Chairman, I think as long as this issue has been raised, I think it should be brought out that you should not simply go on the assumption that everybody is bad that is engaged in gambling, you know. That is a very respected business in my State, and I may say that some of these airlines, if they had the financial stability in back of them that some of the hotels that are engaged in

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gambling in my State have, they would probably be in a lot better shape than they are today; and there are several of them that are in that situation right at the present time.

Therefore, it kind of prompts me to ask you now: What are some of the circumstances outside of U.S.C. 1302 that you think the Board would be justified in finding were not in the public interest—outside of these items listed in 1302?

Mr. McLaren. First let me say that I meant to cast no bricks at people who have gambling interests in States where gambling is legal.

Senator Cannon. I am sure you did not. You see, this started out initially as a one-airline case, but based on the testimony I have read so far, it is developing into a two-airline case, and it brings Nevada into it, too.

Mr. McLaren. I think for the most part, the things that the CAB could and would consider are in this section 1302 because basically they are a Civil Aeronautics Board, and they would consider things that have to do with the soundness of air transportation and the competitive structure, the relationships between carriers, that kind of a pattern.

I certainly agree with Senator Cotton that you cannot get into a moral inquiry on each change of ownership.

Senator Cannon. Generally speaking, would it not appear that if an airline met the test, or if the case met the test of U.S.C. 1302, that they almost would be required to find that this was in the public interest? If all of these things were considered and found to be in the public interest, the answer to every one of those things?

Mr. McLaren. I think that if they did not approve it where everything came out well under 1302, they would have to have some awfully good evidence of other things that they properly took into account that would be contrary to public interest; and the petitioner, of course, would have the right of court review.

Senator Cannon. And it would require a pretty strong case if you found something outside of 1302, which goes into all aspects of air transportation and the operation of an airline?

Mr. McLaren. I would think so, sir, yes.

Senator Cotton. May I ask this? In your previous answer—which I thought was a very good summary, that you gave to Senator Hansen's question—is the point involved the likelihood that some hotel resort, gambling casino, or somebody else that has developed a certain locality, will acquire an airline to run a lot of flights to and from their particular area—be it a recreation area for gambling or skiing—rather than operate the airline for transportation of the general public? It would be run with favoritism, utilizing it to transport people to and from the locality where their other interests lie. That is the meat in the coconut, is it not?

Mr. McLaren. That would certainly be an inquiry. There are various remedies, of course, that are open to the Board. They could, if they saw a danger but did not think that it really required denial of a petition, in the public interest they could condition the grant of the approval and make sure that there was not discrimination. But this is a broad, flexible standard, the public interest, and unless they find something not in the public interest, as I understand, they are

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to grant the petitions but they can condition them to protect the basic standards that they are supposed to be applying.

Senator COTTON. Under this bill in its present form, or under existing law?

Mr. MCLAREN. I think under the act generally the Board is entitled to condition its orders.

Senator COTTON. And that act generally would extend to this bill unless specifically prohibited?

Mr. MCLAREN. Yes.

Senator COTTON. So they do not have to wait until they see that an airline that has been acquired is being misused? They do not have to wait for the condition to arise and they can take steps to prevent it?

Mr. MCLAREN. That is right. They cannot only condition the original grant but, as I understand it, they can take action; if they did not foresee the things, they can take action later to clear the thing up.

Senator COTTON. Thank you.

Senator HANSEN. Will the Senator yield?

I wanted to pursue just a bit further the question that was raised by Senator Cotton.

Does your Department take the position that you should be vested with the authority to make an evaluation of the legitimacy or the propriety of the desire of a person to go any place? I mean, supposing I want to go to Las Vegas to gamble. Is it any less appropriate that I should go there than it is that someone should go to Wyoming skiing or someone should fly to New York to make an investment?

Mr. MCLAREN. No. We certainly take no position on that, Senator.

Senator HANSEN. I would assume that this issue then would come into focus if there was a diminution of service formerly provided for other points in a system or if there was an indication that the equipment was being diverted from those uses to serve a particular purpose. Is that what you are saying?

Mr. MCLAREN. Yes. Or unfair competition in the providing of the service as against other carriers. That would be another pattern.

Senator HANSEN. I would agree with that.

Senator COTTON. The record should show, however, that you go to New Hampshire for skiing; you don't go to Wyoming.

Senator CANNON. Well, Mr. Chairman, may I pursue this a little further? I am a little unclear as to the answer that you gave now to Senator Cotton which the Senator from Wyoming developed there somewhat. You indicated that the Board could control this by orders. Let us take the specific case that gave rise to S. 1373. This is not an attempted acquisition by another carrier and therefore it does not come under section 408. That is what this is all about.

So under those circumstances, a noncarrier can acquire control under the law, as I understand it now; is that not correct?

Mr. MCLAREN. Yes, sir. I was answering, assuming that S. 1373 had been adopted.

Senator CANNON. I think the Senator from Wyoming was trying to question whether or not without S. 1373, as I understood it, an acquisition could be made by a noncarrier and the Board would not have any control over it?

Mr. MCLAREN. That is right.

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Senator CANNON. Then the only way the Board could get into it after that, as I see it, would be if there were an adequacy of service case that came up someplace else and the Board could then examine whether there was an adequacy of service between whatever other two points those were that were on the approved route structure, or unless it was in a new route case or something of this sort. This is the only time that the Board could get into that; is that not correct?

Mr. MCLAREN. That is my understanding. I was talking about the public interest standard in his question. In his question I had understood that he had meant that under the act, as amended, what would the standards be?

Senator CANNON. But if S. 1373 were enacted generally along these lines, then if we reached the point of presumption of ownership, the Board would simply review it; and if they held that this was in the public interest, the acquisition, they could impose whatever conditions they wanted at the time of giving an approval; is that right?

Mr. MCLAREN. I think that is right; yes, sir.

Senator CANNON. And if they wanted to approve them to fly them to New Hampshire for skiing or to Wyoming for skiing or to Freeport for gambling or to Nevada for gambling, these would all be proper considerations at that time?

The CHAIRMAN. And the State of Washington for fishing or skiing.

Senator CANNON. Skiing or fishing in Washington, either one. Is that right?

Mr. MCLAREN. On the record, and on a finding of the public interest, yes.

Senator COTTON. In other words—and I think this was brought out before when I was questioning—if this bill is enacted into law, the flexibility which now exists under the law in regard to acquisition of one carrier by another carrier, the flexibility of precautionary orders, all these other things, would automatically extend to this bill; right?

Mr. MCLAREN. I am sure that is correct. At least as it affects air transportation.

Senator CANNON. And if the Board found it to be in the public interest, the acquisition, whatever the purpose, whether it was by people engaged in skiing or in gambling or fishing or whatever it was, if the Board found out it was in the public interest under section 1302, in all likelihood the Board would be required to approve it, would they not?

Mr. MCLAREN. I would assume this would be right.

Senator CANNON. If they found it to be in the public interest under 1302?

Mr. MCLAREN. That is my understanding.

The CHAIRMAN. This may be a little far afield, but supposing a group of financiers in Europe—let's say British financiers—decided that they wanted to start to buy up stock of an American airline. Would you consider that this bill would cover that, too, if it was passed?

Mr. MCLAREN. I would think that foreign ownership of American carriers could be taken into account under the public interests standards.

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The CHAIRMAN. They would have to be because it poses a real serious problem.

Mr. MCLAREN. I think it does, and national defense is mentioned in the 1302 that we read before. Certainly the air carriers, in the event of national defense needs, are an important factor.

The CHAIRMAN. Then you run into the problem of whether or not, say, they came from one country which also has an airline in competition. That would have to be considered.

Mr. MCLAREN. No question about it.

The CHAIRMAN. Whether they should control. I think there is some of that going on. I am not talking about whether it would be the control, but there are a lot of foreign investors that are in the market today, I think for investment purposes of American airlines. Whereas the American investor, he goes to the marketplace and buys foreign airline stock, too. One of the most active stocks on the stock exchange today is KLM, for instance; that is an example of it.

Mr. MCLAREN. That is right.

The CHAIRMAN. So I am hopeful that what you say would be correct, that this would cover that situation and they could take a look at it. It may be a combination of some of the airlines in Latin America and South America with an American line. It may end up giving better service; you cannot tell.

Senator CANNON. If the Senator would yield at that point?

Section 408 does provide and does cover a foreign carrier or a person controlling a foreign carrier now. But still, section 408 does not cover a person who is not a foreign carrier or not controlling a foreign carrier from acquisition, as I understand 408.

The CHAIRMAN. Start to buy up stock in an American airline.

Well, we thank you very much for your contribution, and we appreciate that you have not had probably as much time to look at all of the ramifications of this bill as you would like, but I think you have done a good job in clarifying a lot of things in the minds of the committee.

Mr. MCLAREN. Thank you very much, Senator, and members of the committee.

The CHAIRMAN. Now we have Mr. Westwood, who represents the law firm of Covington & Burling, and he has written us a letter which I understand you would like to have in the record in full; is that correct?

Mr. WESTWOOD. Yes, Senator, if that is appropriate.

(The letter referred to follows:)

COVINGTON & BURLING,
Washington, D.C., March 24, 1969.

Hon. WARREN G. MAGNUSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MAGNUSON: This letter is written at the request of Western Air Lines and on its behalf concerning S. 1373. In his testimony before your Commerce Committee on March 20, Mr. Tipton, president of the Air Transport Association, expressed for Western, as well as the other airlines he represented, strong support of this bill. Indeed, the bill is widely favored in the airline industry. Western fully endorses Mr. Tipton's excellent statement.

In the course of the hearing on March 20 there was reference to the Western Air Lines situation as an example of the need for such legislation. This situa-

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tion, of course, has to do with the recent acquisition of a large block of stock in Western by a gambling casino operator. Except for this block, the stock of Western is very widely held. Since this block represents about 30 percent of Western's stock, it is obvious that it is controlling. The applicable legal precedents are quite clear on this point.

The present holder of this stock owned no stock in Western prior to December 1968. During December he made a tender offer, financed by a loan from a bank, by which he made an initial large acquisition that has been supplemented since.

Enclosed are three documents filed on behalf of Western with the Civil Aeronautics Board relating to this situation. An answer has been filed to one of these documents which confirms the essential facts bearing on the question whether the gambling casino operator is engaged in a phase of aeronautics. A copy of that answer is also enclosed. As will be noted, the facts show very substantial involvement with air service on the part of this gambling casino. Whether that involvement brings the case within Section 408 of the present Act is the question now pending for decision by the CAB.

If the case is within the present Section 408, of course the CAB will have to determine whether it is in the public interest for Western to be controlled by this gambling casino.

But if it is determined that the present Act does not reach the case, then the gambling casino operator can control Western without regard to the public interest. Both Chairman Crooker of the CAB and Mr. Tipton have pointed out the anomaly that exists because the formal transfer of an airline's certificate to anyone, even to a person not covered by Section 408, requires CAB approval (under Section 401 of the Act), while a person not covered by Section 408 can acquire control of the airline and thereby in effect obtain its certificate without CAB approval.

The only way that the CAB could protect the public, if it regarded control of Western by a gambling casino operator as not in the public interest but not covered by the present Section 408, would be to refuse to grant future new route extensions to Western on the ground that the required finding under Section 401(d) of the Act that the carrier is "fit, willing, and able" cannot be made. This would be a very harsh remedy, damaging to other stockholders of Western and damaging to communities presently served by Western whose service might be improved by such route extensions.

That illustrates, of course, why legislation along the lines of S. 1373 is so much needed and needed promptly. If Congress does not take corrective action an airline in a situation like Western's could be at an extreme disadvantage in its future new route cases, and the communities it serves could be most severely damaged.

In the course of discussion at your Committee's hearing on the bill, it developed that there was some ambiguity as to whether its adoption as presently drafted would give the CAB the power to pass on acquisitions (not coming within Section 408 as it now exists) that had occurred in the past. In this discussion concern was expressed by some members of the Committee as to whether such an acquisition that had occurred, for example, five years ago should now be made subject to CAB approval.

As Mr. Tipton said, the Committee, in considering the bill, might clear up the question; he expressed the view that the bill as drafted, in its second section where an effective date is specified, makes it clear that it would not apply to an acquisition occurring prior to that effective date. He also pointed out that the Committee could, constitutionally, fix any effective date that it believed proper; thus he said, the March 7, 1969, date in the present bill could be changed to a date in July 1968 or, for that matter, March 7, 1968. An airline is peculiarly affected with a public interest even more than is true of the normal public utility enterprise for it involves most delicate national defense considerations; hence it is constitutionally subject to the power of Congress to effect retroactive change in regulation.

It does not follow, however, that there is need to make S. 1373 retroactive to the extent of applying to an acquisition that has been long in effect—for a period, for example, of five years. But that problem can be solved very simply.

In November 1968 the CAB made findings in three new route cases in which it had reviewed the fitness qualifications of every one of the regular trunk air-

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lines (including Western and Pan American). In the course of its findings in those three cases it passed on the fitness of every one of those airlines except for two—National and Alaska—since it granted new routes of one sort or another to all such airlines and it found all of them fit. While it did not, technically, find National and Alaska fit in those cases, since no route award happened to have been made to either of them, in actual fact it did consider their fitness and had there been any question that certainly would have been noted in the course of the CAB's findings. The cases referred to are *Transpacific Route Investigation*, CAB Docket 16242, *United States-Caribbean-South American Route Investigation*, CAB Docket 12895, and *Northern New England-Great Lakes Service Investigation*, CAB Docket 18322.

Thus it is reasonable to conclude that *as of November 1968* there had been CAB surveillance of the fitness of all the regular trunk carriers and there was then no control relationship that raised any public interest question.

Therefore it would make good sense were the Committee to amend section 2 of S. 1373 to make the effective date December 1, 1968. This would make the law applicable to all acquisitions that may have occurred in the case of any of the trunk carriers *since* the CAB's comprehensive review just referred to. At the same time section 2 could be changed slightly so that S. 1373 would apply to acquisitions in the case of air carriers *other than* the regular trunks only from the date of enactment of the new law. Discussion in the Committee hearing indicated, I believe, that the Committee felt there might reasonably be some distinction as between the regular trunks, on the one hand, and the miscellaneous and local service air carriers, on the other hand; and such a distinction in connection with the effective date of the new law would be sensible.

Another point might be of some interest to the Committee. Even under the existing Section 408 the CAB, when it disapproves of a control relationship that has already occurred and requires divestment, does not necessarily act in an abrupt manner. Where it has found that there are extenuating circumstances in the acquisition (a prohibited acquisition, even under the present law, could occur quite innocently), the CAB does not require that the acquirer divest of its interest over-night under distress conditions. It will permit the interest to be put into a liquidating voting trust, with liquidation allowed over a substantial period of time so that any hardship is avoided. The CAB has very broad discretion, and has exercised its discretion in a variety of circumstances with great care so as to avoid injury.

Thus, in the case of an acquisition that has occurred after December 1, 1968, as suggested above, but prior to the enactment of the new legislation, the Committee's report could point out that it is expected that the CAB would exercise its power with discretion and restraint so as to avoid hardship. For example, pending a determination whether the holding in question is in the public interest, the CAB could simply require that the stock not be voted: this would not detract from its value for purposes of a sale to others and it would allow the holder to enjoy its fully value as an investment.

Very truly yours,

(Signed) HOWARD C. WESTWOOD,
Counsel to Western Air Lines, Inc.

The CHAIRMAN. Do you want to discuss the letter, or do you have another statement?

Mr. WESTWOOD. I have no prepared statement, Senator. I thought that what I would do would be to summarize the point of view expressed in the letter.

The CHAIRMAN. The committee has not actually had a chance to look over all that is in the letter, so if you would summarize it?

STATEMENT OF HOWARD C. WESTWOOD, COUNSEL, WESTERN AIR LINES, INC., COVINGTON & BURLING, WASHINGTON, D.C.

Mr. WESTWOOD. Perhaps, first, I better identify myself. I am Howard C. Westwood, a member of the first of Covington & Burling, a law firm in the city. I am on the board of directors of Western Air

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Lines. Also, I and my firm represent Western in connection with various CAB and related problems.

It was as a result of the discussions last Thursday, when Mr. Tipton was here, that I was prompted to write the letter to the committee which was delivered, I believe, on Monday.

It is not that I would trespass on the committee's time simply to repeat what Mr. Tipton said. He was speaking on behalf of Western as well as other carriers and we have great confidence in and respect for Mr. Tipton. When he speaks for us, it is exactly as though we ourselves were speaking.

There was, however, during the discussion some reference to the Western Air Lines' particular situation and its relationship to this legislation, and some discussion of the matter of the effective date of the proposal. It seemed to me, on reflection, it might be of some help to the committee if I elaborated on those two points in the letter I wrote.

As I believe is known, in December of 1968, last year, a casino operator in one of the cities which is on Western Air Lines' system made a tender offer, which was without any advance notice, and as a result of which he acquired apparently in the course of the tender offer about a quarter of the voting stock of Western. Subsequent to the expiration of the tender offer he picked up some more stock and he also got some covertible debentures. The sum of it all is if the debentures were converted, he would have about 30 percent of the voting interest of the airline.

Under numerous precedents, which I do not think need particular reference, that would be working control of the airline because otherwise its stock is very widely held.

A serious question, in our view, is presented as to whether, because of certain activities of the gentleman who owns and operates this casino and certain other of his activities, he is now engaged in a phase of aeronautics. If he is, then his acquisition and control of the airline is subject to the approval of the Civil Aeronautics Board under section 408 as it stands.

That question has been presented to the CAB and is now pending before it. Attached to my letter, I included the documents which had been filed with the CAB by Western, and an answer to one of those documents, which was very ably prepared by a very able counsel for the person who acquired the stock, which had also been filed with the CAB. In those documents, the various facts that have a bearing on this question are set forth, and I do not think there is really any essential controversy as to the facts.

Now, it is delicate, of course, to attempt to discuss a matter before this committee which at the same time is pending before the CAB, and it is not my purpose to get into any discussion of the merits of the issue that is before the CAB. I hope the committee will understand that in no sense——

The CHAIRMAN. We understand that, too. But we do appreciate getting the facts that you say apparently are agreed upon, what took place.

Mr. WESTWOOD. Right. Now the problem here is that if it is determined that section 408 as it stands does not apply to this transaction,

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then there is the very real possibility of a most difficult situation. As has been brought out to this committee in other testimony, if there is an acquisition of control of an airline that does not come within section 408, then however contrary to the public interest may be that control, the only way the CAB can get at it is by the denial of new route authority to that airline.

Now for the sake of discussion—because in essence we are dealing here with an illustration—for the sake of discussion, let us assume that, because of the activities of this interest which has acquired working control of Western, it were to be deemed by the CAB that that interest was in some degree adverse to the public interest, casting some doubt either on the basic fitness of the carrier or on its relative fitness as compared with other airlines, then Western would face this extremely difficult situation every time it sought an extension of its system, a new route extension, for which there is the most ardent competition among the various airlines in their competitive applications. Western would be faced with a demerit; that is, a consideration which would be disadvantageous to it in seeking to achieve for the airline an extension of its route system, because in deciding the route extension case the CAB, faced with different applications by different airlines, would have to decide in each case the relative fitness of the several applicants and which particular applicant would best serve the public interest.

And if the controlling interest in the case of Western involved some consideration which raised an adverse factor, then Western of course would be under a very severe disadvantage and it would affect not only the other stockholders of Western, not only Western as an airline in itself, but it would adversely affect the other communities that Western serves because those other communities can be advantaged by an extension of Western's route system.

In given circumstances, the failure to extend can, of course, have an impact on those other communities which would not be in their best interests.

Because, therefore, of the fact that under existing law, if the case does not come within 408, there is this threat of adverse consequences, Western has been led to support the enactment of S. 1373 and, indeed, to refer to its situation as an illustration of the need for this proposed extension in the CAB's power.

Now I want to refer to the matter of the effective date of the proposal.

Senator COTTON. Would you forgive me if I interrupted you for one question?

Mr. WESTWOOD. Not at all.

Senator COTTON. I am afraid you dropped me off at the start of your statement by indicating that the Western case may now already be covered by 408. Yet, it is my understanding that the person who acquired this stock in Western was not engaged or connected with any other airline or any aeronautics firm. I just could not quite understand how this could come under 408. Would you help me on that so I can follow through with the rest?

Mr. WESTWOOD. That is the question that is pending before the CAB. and the question arises for these reasons: The gentleman in question is the largest single stockholder in Transamerica. Transamerica

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is a very large corporation with very widely held stock. Transamerica controls a very large supplemental air carrier.

Senator COTTON. I understand.

Mr. WESTWOOD. That is one aspect. There are certain other very important aspects of this gentleman's activity. This casino in this city, for example, charters and, in effect, hires airlines to run what it calls "junket flights," bringing persons elected by the casino operator from various cities all over the country to this city as the guests of the casino.

I could go on and point out——

Senator COTTON. You have made it clear to me why there is a question. I thank you, and I hope I did not interrupt your train of thought.

Mr. WESTWOOD. That is all right.

In the discussion the other day—and it was touched on this morning—there was reference to the matter of the effective date of the law. This, of course, gives Western some concern because, were it to turn out that section 408 of the present law does not cover this situation, then in the long run Western might very well be the only one of the trunk carriers with a controlling interest that had not been screened, and it would be the only one that would face the kind of disadvantage that I indicated earlier.

As I pointed out to the committee, the stock was acquired in this instance during December and in the period immediately following. The effective date of the bill before you is March 7, which was the date of introduction. The actual possession of the stock I suppose in itself may be thought not to be control. It is only when the stock is voted or when some steps are taken pursuant to the ownership that the impact of control is felt. None of the stock has yet been voted, of course, so that in a sense this whole transaction or the steps to effect control are in process, and some of them will be taken after March 7, even though essential portions of the step obviously were taken prior to that date in that the legal title to the stock seemingly was all acquired prior to that date.

There was indicated during the committee discussion last Thursday some doubt as to whether in these circumstances the bill as drafted, were it to be adopted, would cover this situation. We too feel there is some doubt. We would like to suggest to the committee for its consideration that that doubt be removed.

As we see it, it might be removed in one of two ways. One I dealt with explicitly in my letter to the committee. The other I will refer to here briefly.

First as to the way suggested in the letter to the committee. It happens that in November of 1968 the CAB took action in three big route cases, the reference citations to which I give in my letter. Those cases were so expansive in their scope that they actually involved every single one of the regular trunk carriers under the U.S. flag, including Pan American and Western.

As the committee knows, in proceedings of that nature there is in issue before the CAB not only a carrier's fitness to operate its system and to be awarded new routes, but also the issue of comparative fitness. And in those cases there was very vigorous contest among the several applicants.

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We suggest, then, as a practical matter, that in the course of those cases any public interest questions involved in the control or ownership of any one of the regular domestic trunk carriers, had there been any such question, undoubtedly would have arisen. In fact, the CAB in the course of those cases actually awarded routes to all but two of the existing trunk carriers so that it actually made a finding with respect to fitness and comparative fitness as of November 1968. In the case of the other two who were not awarded any routes in those particular cases—they were National Airlines and Alaska Airlines—because of the heat of the contest and the scope of the Board's opinion, I think it fairly may be concluded that had there been as of that time any public interest, doubt, or problem with respect to the ownership or control of either of those airlines, it would certainly have been adverted to in the course of the CAB's findings.

We suggest to the committee, therefore, that it may be taken as established that as of November 1968 in the ownership and control situation of the U.S. trunk carriers, there was no problem. And a problem, if any, then could arise only with respect to changes that may have occurred since November of 1968.

That led to the suggestion in our letter that, in order that there might be no gap in the scope of the CAB's screening in order to protect the public interest, the date of March 7, 1969, that is in the present bill be pushed back to December 1, 1968.

As to the constitutionality of such action, there has been some reference by Mr. Tipton; there was some reference this morning. I think it is clear under the decision of the Supreme Court back in 1946 or 1947, involving the death sentence provision of the Public Utility Holding Company Act which involved divestment of interests that had been acquired many, many, many years prior to the adoption of that act, under the decision of the Supreme Court—which on that point was unanimous—there is no constitutional doubt.

The air carriers are deeply affected with the public interest, even more so than in the case of the normal utility system, because of the very special national defense considerations that are involved in the air transport industry.

So that I think that it may be said with confidence that any constitutional question as to the power of the Congress to push the date from March 7 back to December 1 simply is not a substantial question at all. It is, rather, a question of the wisdom of doing so. And in this instance we suggest for the committee's consideration that it would be wise because it would eliminate this gap that I have referred to that would otherwise occur.

Now there is an alternative approach.

Mr. Chairman, I have not seen the CAB's letter. I heard it read and my ear sometimes is not as attentive as it should be, and I am not certain precisely what it was that the CAB is suggesting in that letter. But it may be related to this idea that I was about to suggest.

That is, instead of changing the March 7 date, it be provided—and this could be done very simply by inserting a proviso immediately after the colon that follows the date "March 7, 1969"—that in any case where there has been an acquisition of stock prior to such date but where the voting of such stock has not occurred prior to

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such date, then that acquisition shall be deemed subject to the effectiveness as though it occurred on or after that date.

That would simply leave to the CAB the determination as to (a) whether the acquisition was an acquisition of a controlling interest; and (b) whether, if it is, it is in accordance with the public interest.

The CHAIRMAN. The Board's letter covers two situations: One, if the bill was enacted, their draft of the bill, Would an application and Board approval be a condition precedent to the continued holding of the prohibited quantum of stock which was acquired prior to the enactment? and two, Would an application and approval be necessary in a situation where prior to enactment the unconsummated contract had been entered into for the acquisition of the prohibited quantum of stock?

In the CAB's opinion, the answer to the first question is "no"; and the second, "yes."

Mr. WESTWOOD. Well, then, as I see it, what they are doing is giving their interpretation of the bill as drafted rather than——

The CHAIRMAN. As to how they might act if the bill was passed.

Mr. WESTWOOD. Yes. Well, then, assuming the authoritativeness of that view, that underlines our concern with respect to the bill as drafted. Therefore, I revert to the two alternatives that I submit for the committee's consideration.

The CHAIRMAN. A copy of the letter will be available for you or anyone else who wants it.

Mr. WESTWOOD. I understand that.

Now if I may just touch on one other matter, and then I am done—except I would be very happy to attempt as best I can to answer questions of the committee.

One other matter. I think the committee should understand that where a control acquisition has occurred—and it can occur even under present law quite innocently—the CAB does not necessarily act in an abrupt way. Indeed, the CAB has exercised its powers with very great restraint.

It does not simply say to the offending interest, "you have to go sell your stock tomorrow morning at a distress sale." Rather, what it does is to adopt one of a number of methods whereby distress sales may be avoided and any possible hardship eliminated. It will permit the stock to be placed in a trust for liquidation over an extended period of time, for example. And in one notable case in the past which did come under section 408 and where in good faith the transaction had been entered into which the CAB found should have been approved by it in advance, a measure was adopted by the CAB to unscramble the relationship which resulted, I think, in all parties to the relationship, in the long run, making a very handsome profit because of the leniency with which the CAB permitted the disposition of the interest to be spread over a period of time and to be disposed of in circumstances when it was advantageous. Such measures, however, of course would not permit the actual exercise of the questioned control in the meantime.

That, Mr. Chairman, completes what I had in mind saying. Save for the addition of this one point, it is substantially what I had in-

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dicated in my letter to the committee, and I deeply appreciate your courtesy in permitting me to discuss this matter with you.

The CHAIRMAN. We appreciate you sending up the letter.

This matter is before the Board? I see your last petition was dated March 21, which is a petition for a declaratory ruling. What do you mean by that?

Mr. WESTWOOD. On March 3, in a document actually dated February 28, the petition for a declaratory ruling was presented. Under the Administration Procedure Act—I have now forgotten the section number—it is provided that any administrative agency in its discretion may issue a declaratory order designed to clear up uncertainty or to resolve controversy.

This petition for a declaratory ruling was presented to the CAB by Western Air Lines at the direction of its board of directors pursuant to that section of the Administrative Procedure Act in order to get from the CAB a ruling as to whether section 408 as it presently stands does or does not apply to the transaction.

The CHAIRMAN. What we would like to know—there obviously has not been any ruling yet by the Board?

Mr. WESTWOOD. Not yet.

The CHAIRMAN. Then what would be the time element involved in a ruling on this type of thing?

Mr. WESTWOOD. Mr. Chairman, that is very, very difficult to anticipate. When this petition was filed I had personally thought that it would be ruled on perhaps by now.

I don't mean in any sense to be critical. I realize that the Board is, as it should be, careful in these matters and gives them careful study. I really would hesitate to predict at this point when the Board may rule. It can rule at any time. It has been indicated both by the interest whose acquisition is in question and by the airline to the Board that it is hoped that there may be expeditious consideration and that this doubt, which is a very real and a very troublesome one, be removed.

The CHAIRMAN. It gets pretty complicated in this business. The so-called transpacific case has been sent back to the Board and they are in the process of reviewing it again. That is correct, is it not?

Mr. WESTWOOD. No, not quite that. The domestic phase of the transpacific case——

The CHAIRMAN. Has been sent back?

Mr. WESTWOOD. No, that has not been sent back.

The CHAIRMAN. The international phase which involves all these lines has been given back to the President.

Mr. WESTWOOD. Actually, no route authority was granted to Western in the international phase; only in the domestic phase. The international phase has not been sent back to the Board. Rather, it has been retained by the President for his further consideration on the question of Presidential approval or disapproval of the decision on the international phase that had been proposed by the Board. So that the international phase, speaking in the layman's sense of the term, is not at the Board but is at the White House.

The CHAIRMAN. It is being held up?

Mr. WESTWOOD. That is right.

The CHAIRMAN. For review?

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Mr. WESTWOOD. For review by the President.

The CHAIRMAN. What about the domestic phase?

Mr. WESTWOOD. The certificates issued for the domestic air transportation were originally to have become effective, as I remember, early in March. I am not sure about that. Then the effective date was extended by the CAB, in view of the holdup on the international phase, the effective date of the domestic certificates was extended first to a date late in April as I remember it, and then a second time extended to May 11.

The CHAIRMAN. May 11?

Mr. WESTWOOD. May 11. So that at this point the domestic certificates are to become effective on May 11.

The CHAIRMAN. But they are also reviewing it, are they not? They have not asked for new testimony I do not think. There have been some petitions for new testimony.

Mr. WESTWOOD. There were petitions for reconsideration.

The CHAIRMAN. I do not want to belabor it. Let us put it this way: The whole transpacific case, which is the whole bundle, has been stayed until May 11?

Mr. WESTWOOD. That is correct.

The CHAIRMAN. And the international part of it is being held in the White House for review?

Mr. WESTWOOD. That is correct.

The CHAIRMAN. So there has not been any final determination yet on either one?

Mr. WESTWOOD. Technically there has not been a final determination.

The CHAIRMAN. Technically there has not been. Which, as you point out, could spill over into what we are talking about here?

Mr. WESTWOOD. Correct.

The CHAIRMAN. Senator Cotton?

Senator COTTON. Of course, we always try to lean over backward in enacting legislation that affects the rights of litigants in any pending litigation.

Now if either of your two suggestions were adopted by the committee and approved by the Congress to what extent would the present right of the litigants in this case be prejudiced?

Mr. WESTWOOD. Well, it would not affect the issue that is now pending before the CAB save to moot it. The issue before the CAB is whether section 408 as it exists covers the transaction. The action of the Congress, by amending section 408, would be to expand its scope, which would have the effect—assuming the CAB had not acted in the meantime—of mooting the matter presently before the CAB. If the CAB had acted beforehand and had held that section 408 does apply, then of course there would be no effect whatever.

If it held that section 408 does not apply, but the congressional action thereafter is taken as I suggest, then the rights of the litigants before the CAB is the prior matter would not have been affected. But under the new legislation there would be, of course, an impact as we propose.

Senator COTTON. The person or persons who acquired the 25 or 30 percent stock in Western, are they basing their case in part, on asserting that 408 does not apply?

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Mr. WESTWOOD. Yes, Senator. They have two points. As I say, they are very ably represented. The counsel for them is counsel for whose ability and judgment I have the greatest respect. They have two points in their answer.

One is that in fact the approximate 30-percent interest is not a controlling interest and, therefore, in no event would be subject to the CAB approval.

The other is that, even though controlling, the facts do not disclose an engagement in a phase of aeronautics on the part of the acquirer of the interest and, therefore, section 408 as presently written does not reach the case.

That is spelled out in their answer, a copy of which I sent to the committee.

Senator COTTON. In view of the fact that one of the points involved is what constitutes a controlling interest, I assume it would be a little unfair for a member of the committee to ask you when you are representing an interested party to answer the following question. I have asked practically every witness who appeared before us: Should a certain percentage be named in this bill as constituting presumption of controlling interest, and if so, should it be 5 or 10 percent? I suspect you would prefer not to answer that question.

Mr. WESTWOOD. Senator, I have no objection to answering that because I think I can answer the question in a way that really does not involve any consideration of the particular matter before the CAB, for this reason: I believe Mr. Tipton is submitting a statement to the committee on behalf of all the carriers and a statement with which we agree. I suspect his letter is already before you. But remember that this 10-percent provision or 5 percent or whatever it is—and I would think it ought to be the higher rather than the lower—that that is a mere presumption.

Now, as a practical matter, I as a lawyer can see some advantages, not only in my advising a client, but in the client's exercise of judgment as to what its course of action should be, by having something like that in the law. Because, as the committee knows, this matter of control can be a very tricky thing, and judgments can differ concerning it.

If one adds up all of the precedents that there are, some of which were referred to by the Assistant Attorney General this morning, one will find a great range of percentages which in given circumstances have been held to amount to control in various contexts. The value of having a presumption—be it 10 percent or some other percentage, and 10 percent makes a good deal of sense—the value of having the presumption written into the law is that then counsel advising a client, and a client in making the ultimate business judgment, knows that at least where that figure is reached or exceeded a ruling ought to be secured in order to clear up any doubt.

It does not mean that the 10 percent or greater interest will be controlling. It is simply a firm objective indication for the guidance of the responsible agency of government, for the guidance of the persons being regulated and for the aid to lawyers, who often lose their hair trying to figure out how to advise a client, as to what the safe course will be. And in that sense I can see a very real advantage.

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And that really does not have anything to do with this matter in which we are concerned that is pending before the CAB.

Senator COTTON. I thank you for that. I have just one other question. I probably know the answer to this. But on the actual question of control it is highly possible—I do not know what the rules are covering investments by banks or mutual funds—but it is highly possible that some financial organization could buy 49 percent of the stock of an airline, or 48 percent, or a large amount, purely for purposes of investment and with no intention whatsover of trying to run the airline. Their only interest in the management of the airline would be that if the management of the airline was running the airline into bankruptcy, they might exercise their voting options to protect their interest.

Now if this bill were passed, even with this specific figure for presumption of control, that sort of thing would be taken into consideration by the CAB and would not be probably imperiled. Is that correct?

Mr. WESTWOOD. The short answer is yes. In fairness to the committee, however, I think that I would suggest that if the interest were as large as 49 percent, assuming the other interests were not all concentrated in a single one, if the interest were as large as 49 percent, even assuming such a limitation of interest being professed by the holder, the CAB would regard it, I believe, with a very suspicious eye.

Now it might be possible in such circumstances that the CAB would approve it if it is clear that it is only for investment purposes, with some kind of condition to the effect that the stock shall not be voted. But this is very hypothetical and very speculative. I simply say that in fairness, in such an extreme case as your honor suggests, the CAB would be very cautious

Senator COTTON. Thank you for that appellation.

I did suggest an extreme case. But suppose the block were 20 percent or 25 percent. If the intent of the institution owning it was clearly for investment only, still they ought to have the right to vote that stock in case they thought their investment was being jeopardized by inefficient or incompetent management of the line; should they not? Would you not say that?

Mr. WESTWOOD. I would say yes, that they should. And in such a circumstance, if that block of stock were in fact a controlling block, given the facts as you have indicated them, I do not think there is any question at all but that the CAB would approve it, assuming the law were amended.

The CHAIRMAN. Senator Cannon.

Senator CANNON. Thank you, Mr. Chairman. I just have a few questions.

I have read your letter, Mr. Westwood, with a great deal of interest, and I was just curious as to why you used the term "gambling casino operator" throughout rather than "hotel operator." Is there any particular significance? Was there an intent to derogate the business of a gambling casino operator?

Mr. WESTWOOD. No. This was merely descriptive, Senator. The casino operations quite overshadow the hotel operations. In 1968 my recollection of the figures is that the particular hotel there, the Fla-

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mingo, the hotel receipts I think were $11 million and the casino operation receipts were some $17 million. So that it is descriptive. Essentially it is a casino operation as distinguished from just a normal hotel operation.

Senator CANNON. But you are aware of the fact that up until a very short time ago the present owner owned not only the Flamingo, the ground on which another very substantial hotel is built, and he owned another hotel, and he is building now the largest hotel in the State of Nevada, and so that investmentwise, as a hotel investor, he is a very substantial investor, would you not say?

Mr. WESTWOOD. Yes. But the largest hotel, the International, I suspect will be the largest casino in the world.

Senator CANNON. And one of the largest hotels in the world, will it not?

Mr. WESTWOOD. It will be quite big.

Senator CANNON. In any event, to get it clear, you are not downgrading gaming casino operators or gaming casinos in the State of Nevada?

Mr. WESTWOOD. No, Senator.

Senator CANNON. As a matter of fact, Western Air Lines really have made their biggest profits in operating to and from the State of Nevada and to Las Vegas, have they not?

Mr. WESTWOOD. It has been a great privilege of Western to have been authorized for many, many years to serve Nevada.

Senator CANNON. And we are happy to have had them there. We think they have done a pretty good job, although on occasion we have had to prod them a little bit, you know, but that is to be expected.

Would it be an oversimplification of this matter to say that if the board rules that it does not have jurisdiction under section 408, that the present board of directors would like the Congress to protect them? Is that what they are saying?

Mr. WESTWOOD. The view is that there should be a screening of any control acquisition, and that if there is a screening of any control operation, then it should embrace this one.

Senator CANNON. Is it really your worry that if Mr. Kerkorian, as you say in your petition and your reply, were to acquire 30 percent control in Western, that he might operate that not in the public interest? Is that really your fear? Or is it your fear that he might get more members on the board of directors than you would like to have on there? I do not quite read which it is from your reply here.

Mr. WESTWOOD. Well, there are two documents. One is a petition and the other is a complaint. Neither of these documents, Senator, takes a position on the matter as you have posed it. The petition asks only for a declaratory ruling as to whether the present law applies. The complaint takes the position that section 408 does apply and that Mr. Kerkorian is engaged in a phase of aeronautics.

Now, neither document says that if the law does apply the relationship should be disapproved. Neither document says the relationship should be approved. It is solely the question whether the existing law applies.

Actually, if the existing law does apply, the responsibility would be Mr. Kerkorian's to seek approval.

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Senator CANNON. And if section 408 does not apply, are you or are you not saying that you do not believe that he would operate this airline in the public interest?

Mr. WESTWOOD. We are not saying that. We are saying that if section 408 does not apply, and S. 1373 or something like it is adopted, it should be adopted in a way that would permit Government screening of this particular matter, just as would be true of any other matter.

Senator CANNON. In view of the fact that you have gone into some details of Mr. Kerkorian's background in the aviation business, I would like to ask you: In your opinion, do you believe Mr. Kerkorian would operate this in the public interest if he had control of it?

Mr. WESTWOOD. Senator, I have no opinion one way or the other on that subject.

Senator CANNON. You are a member of the board of directors?

Mr. WESTWOOD. I am a member of the board.

Senator CANNON. What percentage of control does the board of directors hold in Western now?

Mr. WESTWOOD. The sum of their stockholdings?

Senator CANNON. Yes.

Mr. WESTWOOD. It is a very small percentage. I am advised that according to the latest recorded date, the sum of the holdings of the corporate officers and outside directors is about 3½ percent of the total outstanding stock.

Senator CANNON. Is there anything that would have prohibited the board and the officers from acquiring more of the stock in this airline prior to this particular point in time under existing law that you are aware of?

Mr. WESTWOOD. No.

Senator CANNON. As I read your reply, is the whole issue here whether Mr. Kerkorian, if he got his 30 percent, could have as many directors on the board as he wanted? In other words, if the board wants to give him 3, and he wants 5, do I correctly read your reply on that?

Mr. WESTWOOD. The whole issue is whether his control should be screened. If it is to be subject to the approval of the CAB, it should not be exercised until the CAB has approved it.

Now, what particular proposition he might propose I do not know. I am not trying to duck a question, Senator. I simply point out that the only issue that has been posed is the issue of the application of the law.

Senator CANNON. I thought you were raising a few minutes ago the threat of adverse consequences, as you used the term.

Mr. WESTWOOD. Right.

Senator CANNON. Do you really think there is likely to be here a threat of adverse consequences by this airline not being run properly?

Mr. WESTWOOD. There could be, in the CAB's judgment.

Senator CANNON. I asked you if you thought there was really a danger of it?

Mr. WESTWOOD. I can see some very real dangers. Do you want me to illustrate?

Senator CANNON. That you can see in this now, at the present time?

Mr. WESTWOOD. Yes, sir.

Senator CANNON. Yes.

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Mr. WESTWOOD. Let me point this out. Hitherto in the airline industry, except in the case of the local service carriers, I do not know that an issue of this sort has arisen. It is quite familiar in other types of licensing cases before the FCC, for example. But if you have control of an airline system that stretches, as does Western's, from Alaska in the north to Mexico in the south, highly localized in one particular city, in the hands of an interest which has a great incentive because of its other concerns in that locality to build up transportation to that particular point and to serve the convenience of that particular interest, you may very well have, in the judgment of a responsible Government agency, an important issue of transportation policy.

For example, in some of the early local service carriers, you had a very similar issue presented to the CAB. You would have one applicant for a local service operation which had ownership pretty much identified with the area being served. You would have another applicant, the ownership of which was not particularly identified with that area.

I am speaking from memory on these cases, but I am quite sure my memory is accurate. The CAB decided that in terms of the public interest and achieving the best kind of transportation for the area in question, it should prefer that applicant whose ownership interest was identified with the area.

In the FCC field you have that kind of a problem, going into the matter of ownership and the relationship of ownership to the particular service that is to be provided. You have this in licensing cases all the time. I can well imagine that in a case of this sort, where there would be control that would be so highly localized, involving an interest which has an independent economic incentive to utilize that control in a way that would promote that interest, a Government agency representative of the public might very well have grave doubts about it.

In a case where that applicant was competing with another applicant, where that problem was not present, the other applicant might be preferred despite the prejudice to the other stockholders of this particular carrier and the prejudice to other communities that that carrier serves. That seems to me a very real possibility.

Senator CANNON. Of course, the other communities have the right and the opportunity and very frequently come in on an adequacy of service hearing.

Mr. WESTWOOD. Senator, adequacy of service has been demonstrated in case after case to be a situation where the Government agency has very great difficulty coming to grips with the matter. Adequacy of service depends mainly upon the judgment of management and the operation of the airline, on the day-to-day management decisions in a way that will most effectively serve the public and the ability of a Government agency itself to step in, and in effect, take over the management of the airline, which it would have to do if adequacy of service were to be protected, the ability of the Government to do that is very restricted.

There was a big case involving adequacy of service to Baltimore. It was a landmark case in the history of the CAB, where the CAB tried

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to come to grips with the thorny problem of how Government could regulate adequacy of service and in fact—and without making any faces at the CAB—the result of that case was virtually throwing up hands and saying, "This is next to impossible." You have to depend on management, and a management that is devoted to the even-handed service of the entire area.

Senator COTTON. If you want a witness on that point, swear me in, because New Hampshire and Vermont have been trying for years to get some service down to Boston.

Mr. WESTWOOD. Right.

Senator CANNON. Are you saying here your real fear here is that if this acquisition were permitted, that Mr. Kerkorian might emphasize the service between Los Angeles and Las Vegas to the detriment of other areas on the route? Is that it?

Mr. WESTWOOD. All I am saying, Senator, is that that would be one very pertinent consideration. Would the orientation of this airline to that particular locality and that particular economic interest endanger the provision of the most abundant and fruitful service to other points on the system? That would be, I am sure, a very real consideration. And there are plenty of precedents that indicate its relevance.

Senator CANNON. Mr. Chairman, I must say I find this to be of very great interest because it has not been very many years—and I must say it was probably before the witness' association on the board of Western—when I was fighting just the opposite position of Western. They had a closed door restriction in their favor between Las Vegas and Los Angeles and fought like the dickens to keep from giving it up. They had a closed door restriction where United or TWA could neither ticket from Los Angeles to Las Vegas or Las Vegas to Los Angeles. Western fought tooth and nail to keep the closed door restriction in their favor because they needed this very lucrative business segment in their run. I fought it as a lawyer on behalf of the city of Las Vegas to get this restriction removed, and we were finally able to get it removed. I think it did Western the biggest favor they have ever had done for them because it immediately increased business. Business begets business, they say, and that is exactly what occurred on that occasion.

So I find it rather interesting now that they come in and say if someone in Las Vegas acquired 30 percent control of the airline they might emphasize the business between Las Vegas and Los Angeles too much, when that was the thing they were really asking for some 12 years ago.

Mr. WESTWOOD. Senator, all I have said is that that possibility would be regarded, I am sure, by the CAB as a pertinent consideration that should concern it. That is all I have said. I have not said that Mr. Kerkorian would do this. I have not said that Western Air Lines would or would not take any particular position on the question of approval of this control.

All I have said is that (a) the adoption of S. 1373 makes good sense for all the reasons Chairman Crooker and Mr. Tipton and others have pointed out; and (b) if S.1373 and legislation along that line is to be adopted, this gap should not be permitted by the Congress to persist.

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Senator CANNON. Did Western ever suggest a change in this law to this effect prior to Mr. Kerkorian's obtaining this purchase right?

Mr. WESTWOOD. Not that I know of.

The CHAIRMAN. The Chairman can say that nobody showed up about this matter until just the last month, as far as the committee officially knows. All of a sudden they all show up after it has happened or it is about to happen. That is what has made it difficult for us, because there are some pretty deep questions involved in this whole thing, other than just the thrust of this bill.

How far back do you go, for instance? I do not know whether someone might have acquired control of an airline maybe a year ago. It could be possible. I do not know.

Mr. WESTWOOD. Mr. Chairman, in view of the CAB cases that were resolved in the course of November 1968 I think with some confidence it can be felt that there was no public interest problem in anything that happened theretofore.

The CHAIRMAN. It is now much different with the whole conglomerate problem involved.

Mr. WESTWOOD. Sure. And there are some other airlines that are sitting ducks for conglomerate acquisition, takeovers or raids.

The CHAIRMAN. That is because the management in many cases does not own enough of the stock together to maybe head off these things. You take the other case where we are talking about service, the Air West thing. But there Mr. Hughes at least did not do that. He just petitioned the Board to say: "I would like to buy it."

Now, clearly under 408 they have to rule. That case is pending.

Senator CANNON. It is a 408 proceeding.

The CHAIRMAN. Yes. And this is a little different. I agree that maybe a year or so ago some of the people were not as aware of this as they are now. I am not criticizing anybody, but the committee did not hear from anyone last year. We were in session pretty late, too.

Senator CANNON. On this question of retroactivity, would your client have any objection to having it made retroactive to the date of the original Civil Aeronautics Act?

Mr. WESTWOOD. I think it would be academic. I do not know that there is any particular objection, but it would be pretty academic. I am speaking of the regular trunk systems as I say this. It is perfectly clear that is of November 1968 there was no public interest problem in the ownership or control of any of the regular trunk carriers.

Senator CANNON. You suggested on that point that we should go back to November because of the decision at that time. But the case was closed long before November?

Mr. WESTWOOD. The evidentiary hearing?

Senator CANNON. Yes.

Mr. WESTWOOD. Yes, Senator, but there are stipulations and whatnot in these records that are always kept open.

The CHAIRMAN. Excuse me. I have another meeting, and we have yet to hear briefly from John Stephen.

Senator CANNON. I have no further questions.

Senator HANSEN. No further questions.

Senator COTTON. No questions.

Senator CANNON (presiding). You may proceed.

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STATEMENT OF JOHN E. STEPHEN, GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA

Mr. STEPHEN. My name is John E. Stephen; I am general counsel of the Air Transport Association.

On the occasion of Mr. Tipton's testimony before the committee last Thursday, a number of questions were raised which we were not then able to answer, because time had not permitted clearing the matters involved with our airline members.

Since that time we have done so, and we have undertaken to answer the questions raised to the committee by a letter which we have circulated to the members of the committee.

I am prepared, as may be the wish of the committee, either to read it into the record or simply summarize it and answer any questions you might have.

Senator CANNON. We will just make it part of the record and why don't you summarize from the other basic points you wanted to address.

(The letter referred to follows:)

AIR TRANSPORT ASSOCIATION OF AMERICA,
Washington, D.C., March 26, 1969.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce.
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: In our statement to the Committee on March 20, 1969, in the hearings relative to acquisition of control of airlines, we promised to submit to the Committee, after further consultation with our airline members, suggested changes to certain sections of S. 1373, as discussed in the hearings.

The various issues were considered by the ATA Board of Directors at their spring meeting on March 25, 1969. We accordingly submit at this time our resulting proposed changes to S. 1373, with explanatory comments.

Our proposed amendments are as follows:

1. S. 1373 comprises a quick and direct approach to giving the Civil Aeronautics Board approval authority over acquisition of control of air carriers by non-carriers and non-aeronautical entities. S. 1373 would accomplish this objective by simply adding this new class of persons to those classes of acquirers now covered by Section 408(a)(5) of the Act.

We believe this to be the best method of accomplishing the legislative objective involved.

We would suggest only one change from S. 1373 in this respect. S. 1373 would expand the coverage of existing Section 408(a)(5) to non-carrier acquirers of control by inserting the underlined words, as follows, in the existing paragraph:

> "(5) For any air carrier or person *whether or not* controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;"

It would appear preferable to insert the underlined words in the *second* line of Section 408(a)(5), as follows:

> "(5) For any air carrier or person controlling any air carrier, any other common carrier, or any person *whether or not* engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever; *Provided, That the Board may exempt from the requirements of this paragraph any transaction involving the acquisition of control of any air carrier other than a certificated air carrier to the extent and for such periods as may be in the public interest.*"

This wording would better ensure application of the amended coverage of the paragraph to non-aeronautical acquirers of control of an air carrier, and thus appears broader in application than S. 1373.

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The suggested proviso added to paragraph (5) would recognize the Board's flexibility to exempt small carriers such as air taxis from the application of the proviso, as urged by the Board.

2. We agree with providing, as in S. 1373, for a stipulated percentage of ownership as constituting a *prima facie* legal presumption of control (which the applicant may rebut under his burden of proof). However, we would apply the presumption only to *capital stock*, and not also to "capital", as proposed in S. 1373.

A guideline based on "capital" ownership would introduce ambiguity and complexity into an otherwise straight-forward provision. It is uncertain, first of all, exactly what would be included under "capital", particularly in a situation involving certain trust and debt relationships. These are better left undisturbed.

We assume that the reference to "capital" in S. 1373 was simply brought over into the proposed language for amending Section 408(a) because the term is now found in the reporting provisions of Section 407(b) of the Act. It is appropriate, of course, that the existing language of Section 407(b) be followed in the proposed extension of the reporting requirements of 407(b) to persons owning the stated interests, as well as the carrier itself.

But there is no compelling basis for exact parallelism as between the reporting requirement of Section 407(b) and the approval requirements of Section 408(a) as they relate to acquisitions of control. On the contrary, in view of the more stringent *operative* effects of Section 408, under which certain named acts are declared unlawful absent CAB approval, it is appropriate that any presumption of control attach only to clearly identifiable interests, such as ownership of *capital stock*. We have so limited it in our draft amendment.

3. Similarly, while it might seem logical that the exact language of existing Section 407(b) be adhered to in expanding reporting requirements to persons owning more than 5 per centum of the "*entire* capital stock" of an air carrier,[1] it is neither appropriate nor desirable that the "*entire*" criterion, or the specific figure of 5 percent, be followed blindly in amending Section 408(a)(5) respecting acquisition of control.

On the contrary, since it is control of the air carrier with which the latter paragraph treats, the presumption should attach to ownership of a stated percentage of *voting* stock, not to the "entire" capital stock of all classes. Ownership of whatever amount of non-voting stock should not create any presumption of control. Our draft amendment would thus limit the presumption of control to the acquisition of a stated percentage of the *voting* stock of the carrier, and not of its "entire" stock.

4. There is room for considerable difference of opinion on the exact percentage of ownership which should be presumed to constitute control of a carrier. S. 1373 stipulates 5 percent. Presumably, this 5 percent standard would refer to ownership of total voting and non-voting stock.

For reasons previously stated, we believe that the presumption should attach only to ownership of voting stock. Since this would, in most cases, comprise less than all of the carrier's capital stock, the applicable percentage should be higher than where based on the entire capital stock of the carrier. In our opinion, the ownership percentage of voting stock applicable to a presumption of control should be 10 percent. (Attached is a memorandum on the 10 percent standard for presumed control.)

There are additional considerations why 10 percent is a reasonable and appropriate figure for this purpose. First, the number of air carriers of which there is ownership by one person of 10 percent or more of voting stock or even entire stock, is extremely limited. Of the trunk carriers, based on latest available reports filed with the CAB, only two have ownership of as much as 10 percent of their capital stock by one person. The stock of most such carriers is widely held, among many thousands of stockholders, no one of which owns any substantial percentage. Therefore, it would not impose any burden on the ordinary investment purchasers of airline stocks to adopt a 10 percent test as *prima facie* control.

In contrast, it is not uncommon for individual investors to acquire 5 percent or more of an airline's stock. In fact, most carriers have now or have had his-

[1] However, S. 1373 does not follow the literal language of Section 407(b) in expanding the reporting requirement. Section 407(b) now applies to ownership of 5 percent of the "entire capital stock or capital" of a carrier. S. 1373 omits the word "entire". The resulting distinction, or intended distinction, if any, is not clear.

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torically one or more stockholders who own 5 percent or more of their capital stock. Thus, a 5 percent presumption threshold would doubtlessly place a burden on ordinary investors to prove that their purchase would not constitute control. This seems neither reasonable nor necessary to the purpose involved, particularly since the figure is only a guideline, with the CAB remaining free to inquire into any lesser percentage as may appear justified.

In order to clarify the intended power of the Board to determine "control" in the case of ownership of less than 10 percent of voting stock, we suggest the following amendment:

> "Sec. 408(f) A person will be presumed to control an air carrier if he owns beneficially 10% or more of the voting stock of such carrier, which presumption may be rebutted by evidence satisfactory to the Board but the Board may determine that a person controls an air carrier even though he owns less than 10% of the voting stock of an air carrier."

5. To give the Board reasonable flexibility in granting prompt approval where there are no conflicts of interest or other regulatory problems, particularly in minor proposed acquisitions, we would suggest amending the third proviso of Section 408(b) as follows:

> "*Provided further*, That, in any case in which the Board determines that the transaction which is the subject of the application ~~does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation,~~ does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction."

With respect to the question of retroactivity, there would not appear to be any question that Congress could constitutionally provide for an effective date of March 7, 1969, as provided in S. 1373, or an even earlier date.

Whatever action might ultimately be taken by the Congress, it is important that it provide for *advance* CAB approval of acquisitions of control of an air carrier, and not merely post facto review of a completed acquisition. We believe that our suggested amendments assure this result.

We appreciate the opportunity to submit these suggested amendments for the Committee's consideration.

Cordially,

S. G. TIPTON.

Attachment.

TEN PERCENT STANDARD FOR PRESUMED CONTROL

A 10 percent standard for presumed control would also correspond more closely than a 5 percent test to the historical determination of agencies and courts on the issue of control by means of stock ownership. A Senate Committee has found that control of a public utility could be attained by groups holding as little as 3 percent of the total voting stock of a corporation. (Hearings before the Senate Subcommittee on Interstate Commerce, Public Utility Holding Company Act, 74th Cong., 1st Sess. (1935), p. 469.) The Von Sweringen system of railroads was controlled through a network of holding companies, so that control over the operating companies was exercised through ownership of less than 1 percent of their stock. (Adolph A. Berle, Jr. and Gardiner C. Means, *The Modern Corporation and Private Property*, 1932, Chart III, p. 74.)

These examples represent an extreme, however, and a clear majority of court and agency cases involving determinations of control through stock ownership have been at a figure of 10 percent or more. For example, the CAB held that 11.4 percent stock ownership constituted control where it elected 9 of 17 members of the board of directors (*Atlas Corp.—Control of Consolidated Vultee*, 9 CAB 921 (1948)); the I.C.C. found that a 10 percent stock ownership constituted control (*Greyhound Corp.—Control—Southeastern Greyhound Lines*, 57 MCC 123, 142 (1950)); the SEC found control by virtue of 18 percent stock ownership (*American Gas & Electric Co.* v. *S.E.C.*, 134 F2d 633, 642 (D.C. Cir., 1943)); and the F.C.C. found control existed where there was a 33 percent stock ownership (*Rochester Telephone Corp.* v. *U.S.*, 307 U.S. 125, 144–145 (1939)).

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Finally, Congress itself has recognized the validity of a 10 per cent ownership criterion for similar purposes. For example, section 2(a)(7) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(7), creates the presumption that the ownership or holding of 10 per cent of the outstanding voting securities of a public-utility company constitutes control unless the S.E.C. determines otherwise. The Securities and Exchange Act of 1934 was amended last year to provide that any person who acquires 10 per cent of any class of equity security registered with the S.E.C., or who makes a tender offer for such securities involving at least 10 per cent, must provide certain disclosures concerning itself and its intentions. (15 USC 78m(d) and 15 USC 78n(d)).

Mr. STEPHEN. Good, Senator Cannon. First, we had raised the point as to how the operative provisions of any proposed amendment to existing section 408 should be accommodated in the legislation.

It is our suggestion, as explained on pages 1 and 2 of the letter, that this be done by the simple insertion in the present provision of the words "whether or not" in line 6, page 2, of the bill, so that the scope of existing section 408(a)(5) would extend to noncarrier and nonaeronautical acquisitions of an air carrier.

We have added to that suggested change a proviso, shown on page 2, underlined, which would simply enable the Board to exempt from the requirements of that paragraph those similar air carriers, such as air taxis, who are not certificated by the Board, so that this amendment would apply only to certificated airlines.

Secondly, we have undertaken to make the provision applicable only to capital stock of an airline, not, as suggested by the Civil Aeronautics Board and others, acquisition of "capital."

We are not clear as to exactly what the word "capital" embraces; moreover, it is control that we are talking about, principally through the acquisition of capital stock.

In the same connection, we would not——

Senator CANNON. In other words, you want to eliminate the probability, or the possibility of, let's say, a lending company being involved in control simply because they made a loan to the carrier.

Mr. STEPHEN. That would be one of the objectives, yes. Those questions do get rather difficult, as has been pointed out in the previous statement before the committee.

In this same connection, the existing reporting requirements in section 407(b) are tied to the ownership of 5 percent or more of the "entire" capital stock. The word "entire" is a key word.

However, as applied here, we would be talking about the acquisition provisions of section 408 as related to the voting stock of a corporation. So that our amendment throughout is tied to the ownership of voting stock, not the ownership of other classes of stock.

As to the question of whether there should be any presumption at all, as raised by Senator Cotton, we do believe that there should be a legal presumption of control for the reasons which have been stated here both by the Assistant Attorney General and Mr. Westwood in his comments just concluded.

As for what that percentage ought to be, whether it should be 5 percent, 10 percent or some other figure, we have concluded that it should be 10 percent. The reason for that conclusion is that, it is a proper and a reasonable figure.

The number of air carriers of which there is ownership by one person of 10 percent or more of the voting stock is extremely limited. In

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fact, according to our best count as of the last ownership reports to the Civil Aeronautics Board, there are only two carriers in which one person owns as much as 10 percent or more of the capital stock.

As was pointed out in the case of Western Airlines by Mr. Westwood, the same would be true of the other airlines, other major trunk airlines at least; that is, widely hold stock among many stockholders, running up in some cases to 20,000 or more.

Therefore, it would not impose any practical burden on investors who simply wanted to acquire a large block of airline stock as an investment to require them to comply with the presumption provisions of an amended section 408. There wouldn't be many of them.

In contrast, if you get down to percentages as low as 5 percent, there are quite a few individual blocks of stock of as much as 5 percent owned in a good many of the trunk lines and in virtually all of the local service airlines. A 5 percent presumption could prove burdensome.

Attached to the letter is a memorandum which also sets forth some additional reasons, based on interpretations before other agencies and by the courts, on what percentage of stock ownership has constituted control. The essence of the memorandum is that it has been determined that as little as 3 percent, or in one case as little as 1 percent—or in some cases the ownership of no stock—may still comprise control. I believe the question was put to the Assistant Attorney General, as to what was the highest percentage of stock ownership within the knowledge of the Justice Department, which did not have control. The Assistant Attorney General was unable to answer that question, and I can't answer it either in terms of the Justice Department's experience. But in the experience of the administrative agencies, there is at least one ICC case in which the ownership of 75 percent of the stock did not have control.

Looking at that case in reverse, you can thus have as little as 25 percent controlling. Actually, there are cases where a lesser amount than 25 percent was controlling, under the circumstances.

Finally, we believe that the CAB is correct in stating that it should retain some flexibility in administering any amended section 408. We have provided for that in two ways.

First, by attaching a proviso to the operative paragraph 5, which would permit the Board to exempt carriers other than certificated carriers. Second, on page 5 of the letter, by an amendment to the third proviso of existing section 408(b), under which the Board could dispense with a hearing in the case of a transaction in which no hearing is sought and in which no substantial questions of monopoly or restraint of competition exist.

We believe that these two provisos would give the Board sufficient flexibility, as they have requested in dealing with an amended section 408, so that no problems of delay would be raised in the case of minor acquisitions or acquisitions purely for investment purposes.

In this connection, I might comment that the earlier suggestion, that under existing section 408, the Board's sole standard is one of the public interest, is not wholly correct. Under section 408(b), the first proviso—and to some degree the second proviso—the Board is not only held to the public interest standard, but is expressly prohibited by Congress from approving any acquisition which results in creating

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a monopoly or monopolies and thereby restraining competition or jeopardizing another carrier party not a party to such acquisition.

The existing statute thus specifically takes cognizance of the monopoly problem and restraints of competition.

Senator CANNON. I think it would probably follow that that would not be in the public interest anyway, so it may be a question of which comes first, the hen or the egg.

Mr. STEPHEN. Probably so—in most cases. I am not prepared to comment on the statement of the Assistant Attorney General on these matters, which we heard for the first time this morning. But I think I could say at this time that his proposed amendment to section 414 is not warranted by either the existing provisions of the statute or by anything that has been said in connection with this proposed change.

His alternative amendment, on its face, would also appear not to be warranted at least in excluding only transportation transactions. Existing section 408, is not confined to transportation, but deals also with common carriage generally, and with phases of aeronautics, which is not necessarily transportation.

In fact, it has been held by the CAB that the phase of aeronautics may even take in an oil company that sells aviation fuel.

So we don't think the transportation exclusion of the proposed amendment——

Senator COTTON. What was your specific objection to his first proposed amendment?

Mr. STEPHEN. It is too broad. I would hesitate to comment in detail without giving further study to the scope of the proposal made by the Assistant Attorney General. But on its face it would appear to propose a remedy far more extensive than warranted as an offset to any concern the Justice Department may have about CAB consideration of antitrust questions under 408 approvals.

The proposed amendment would restrict the entire scope of existing section 414 of the act. It would apply to all CAB approvals, not just approvals by the CAB under section 408(a)(5) which is involved in this legislation.

Senator CANNON. Of course, if the act is amended, as proposed in 1373, then the second part that applies to 408, in effect does the same thing as his amendment to 414 proposes, wouldn't it?

Mr. STEPHEN. I do not believe that it does. S. 1373 would insure that the Attorney General under section 408(b) must be notified of an application; it would not be a question of his having to discover such a transaction by reading the Federal Register.

He would be notified expressly by the Civil Aeronautics Board, and unquestionably would come in and oppose any transaction which he felt had an undue anticompetitive or monopolistic effect.

Senator CANNON. I think in fairness to your organization and as help to this committee, I think we should ask you if you would like to respond to the Attorney General's testimony here this morning because you haven't had the opportunity to see it prior to today. And it certainly would be helpful, at least to submit to us for the record in the event we don't have public hearings.

Mr. STEPHEN. We would be pleased to do so.

Senator COTTON. How soon could you possibly do that? I don't know what the intention of the chairman is, but——

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Mr. STEPHEN. We will do it rather quickly, Senator Cotton. In all events, as quickly as we can, but we will make a special effort to meet whatever timetable the committee may have.

Senator CANNON. Let's just say you will submit it as soon as you can have it ready.

Mr. STEPHEN. We will do so.

(The response to the Attorney General's testimony follows:)

ADEQUACY OF EXISTING ANTITRUST SAFEGUARDS IN CAB CONSIDERATION OF SECTION 408 ACQUISITIONS OF CONTROL

PRELIMINARY STATEMENT

In its testimony supporting the objectives of the bills to expand Civil Aeronautics Board authority under Section 408(a)(5) of the Federal Aviation Act to include acquisitions of control of air carriers by non-carriers and non-aeronautical entities, the Department of Justice has raised the question whether an unintended legal consequence of the legislation might be to give antitrust immunity to "transactions in industries outside air transportation", and thereby "prejudice broader efforts to preserve vigorous competition in the Nation's economy."

It was suggested that this might result under the legislation from the CAB's approving a non-carrier's acquisition of an air carrier on basically "air transportation" considerations, and the acquirer's thereafter contending that the "antitrust laws could not be applied to any aspect of the transaction, even though it would have substantial anticompetitive and harmful effects outside air transportation."

To offset this asserted possibility, Justice proposed that the antitrust immunity provided under existing Section 414 of the Act be expressly limited by the following amendment:

"Provided, however, that no order of approval shall relieve from the operation of the antitrust laws acts, practices, or transactions which violate the antitrust laws with respect to any line of commerce other than transportation."

Alternatively, Justice proposes that this amendment to Section 414 be applied at least to all CAB orders of approval under Section 408 of the Act.

It is believed that Justice's concern is not warranted, in light of the existing safeguards of the Act, particularly as interpreted and applied by the Civil Aeronautics Board and the courts. There is, accordingly, no sound basis for enacting any such special amendment to Section 414. On the contrary, the proposed amendments would introduce uncertainties and complexities into an otherwise established statutory scheme.

1. *The Antitrust Immunity of Section 414 Is Already Narrowly Limited in Scope.*

Under Section 414 of the Act,[1] persons affected by CAB orders pursuant to Section 408 are afforded, *inter alia*, immunity from the antitrust laws. Even absent express limits on such antitrust immunity, the Supreme Court has held that such statutory exemptions for regulated industries "are to be very narrowly construed."[2]

Congress in enacting Section 414, moreover, has expressly and narrowly confined the scope of the antitrust immunity provided.

Section 414 provides:

"Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws', as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, *insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.*" [Emphasis supplied]

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[1] 49 U.S.C. Sec. 1384.

[2] *People of State of California* v. *Federal Power Commission*, 369 U.S. 482, 485–486, 82 S. Ct. 901, 8 L. Ed. 2d 54 (1962); *Maryland & Virginia Milk Producers Ass'n* v. *U.S.*, 362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880 (1960).

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The courts and the CAB have made it clear that the scope of the antitrust exemption provided by the words, "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order" is strictly limited, and does not provide any antitrust immunity to subsequent or unrelated activities and transactions.[3]

In the "Toolco" case,[4] the court rejected the very proposition being suggested here by Justice, viz., that CAB approval under Section 408 provides antitrust immunity to all aspects of an acquisition. Defendant, Hughes Tool Company (Toolco), contended that all of its allegedly anticompetitive acts complained of by TWA were immunized under Section 414, because of the CAB's earlier approval of Hughes' acquisition of control of TWA.

The district court disagreed and ruled, as to the CAB orders of approval,[5]

"These orders did not give Toolco a license to engage in any other acts that normally may be forbidden by the antitrust laws. What has been approved and exampted *is the fact of 'acquisition of control,' not activities engaged in by the controlling party subsequent to acquisition, which may be illegal.*" [Emphasis supplied].

The court pointed out that the limiting language in Section 414 has not been found in any decided case to afford antitrust immunity as to anything more than the possible antitrust violations present in the acquisition itself, saying:

"This is far different from the immunization claimed by Toolco. Congress could not have intended that restraints or attempts to monopolize, subsequent to an order allowing acquisition of control, were necessary to enable Toolco to do anything authorized or approved by the order." *Id.* at p. 110.

Finally, said the court, the courts in all events retain jurisdiction under the antitrust laws to determine the *scope* of the immunity resulting from such CAB approval:

"It is also clear that once a regulatory agency has acted the court is competent to consider and determine the scope of the exemption claimed. *River Plate & Brazil Conferences* v. *Pressed Steel Car Co.*, 227 F. 2d 60 (2d Cir., 1955); *Putnam Air Transport Ass'n of America*, supra. The cases of *American Airlines* v. *Standard Air Lines*. 80 F. Supp. 135 (S.D.N.Y. 1948) and *United States* v. *Railway Express Agency*, 89 F. Supp. 981 (D. Del. 1950), relied on by Toolco, are not in point." Id at p. 112.

In upholding the jurisdiction of the lower court, the Court of Appeals for the Second Circuit affirmed these conclusions, saying:[6]

"Nor do we find any merit in the defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the ramifications of these transactions. Title 49 U.S.C. § 1384 extends such immunity only 'insofar as may be necessary to enable such person to do anything authorized, approved or required by such order.' As Judge Metzner noted, the Board's approval of acquisition of control by Toolco over TWA did not carry with it approval of every transaction which Toolco might choose to effect in the exercise of its control. To give § 408 such a carte blanche effects would be to pervert the entire regulatory structure of the Aviation Act. Nor can any of the activities with which Toolco stands charged be deemed to have been necessary to the exercise of its control relationship."

Not only is the extent of the immunity granted by Section 414 thus limited, but Section 414 itself is extremely narrow. The Attorney General has stressed on two occasions that the Section 414 exemption must be secured "in the precise manner and method prescribed by Congress."[7]

"Whole areas" of the antitrust laws, therefore, may be regarded as "not touched by this exemption", e.g. *exclusionary* activity.[8]

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[3] *McManus* v. *C.A.B.*, 286 F. 2d 414 (CA 2, 1961), cert. den., 81 S. Ct. 1649, 1268; 366 U.S. 928, 6 L. Ed., 2d 388; reh. den., 81 S. Ct. 1918, 366 U.S. 973, 6 L. Ed. 2d; *Trans World Airlines, Inc.* v. *Hughes*, 332 F. 2d 602 (CA 2, 1964), cert. dism., 85 S. Ct. 934, 380 U.S. 248 13 L. Ed. 2d 817, 818 (1965); *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F. 2d 441, 446 (CA 2, 1968).

[4] *TWA* v. *Hughes*, et al., 332 F. 2d 602 (1964).

[5] *TWA* v. *Hughes*, et al., 204 F. Supp. 106, 110.

[6] *TWA* v. *Hughes*, et al., 332 F. 2d 602, 610. The Supreme Court has even suggested that the agency may properly limit the total number of its approvals in order to minimize the number of transactions that may result in antitrust exemption. *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, et al., 390 U.S. 261, 274, 19 L. Ed. 2nd 1090, 88 S. Ct. 929 (1968).

[7] 40 Ops. Att'y. Gen., 335, 338 (1944); 41 Ops. Att'y. Gen., 333, 340 (1957), both citing *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 226 (1940).

[8] *Ailes*, "Regulated Industry and Antitrust." 32 ABA Antitrust L. J. 215, 224 (1966).

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Even if some of the *means* (e.g., acquisition of control) of a conspiracy to exclude a competitor may have received CAB approval, the resulting Section 414 immunity would not extend to the exclusionary end of such a conspiracy. This results from the application of the principle that "lawful means may not be used to accomplish any illegal combination and conspiracy." [9]

In fact, in the area of exclusionary activity, the CAB actually has an affirmative role in the *enforcement* of the antitrust laws, by reason of the unfair competition provisions of Section 411 of the Aviation Act. The Board has manifested an acute awareness of the antitrust significance of Section 411,[10] which is, of course, patterned after Section 5 of the of the Federal Trade Commission Act.[11] Activities violative of the Sherman Act have been held to constitute an "unfair competitive practice" under Section 5 of the Federal Trade Commission Act, and would therefore be unfair competitive practices under Section 411 of the Federal Aviation Act.[12] The Board has likewise specifically approved application of the prohibitions of Sections 7 and 10 of the Clayton Act to a proposed transaction.[13] In addition, the Board has used its other statutory powers, e.g., its minimum rate order powers,[14] for basically antitrust purposes. It follows that "the antitrust laws are an effective force before the courts and indeed before the Board" in the field of exclusionary antitrust activity.[15]

Apart from these limitations on the scope of Section 414 immunity, the Board in applying the Act does not regard its orders of approval as being *in perpetuity*. It has been the Board's customary practice to retain jurisdiction in proceedings arising under Section 408, for the stated purpose of imposing, from time to time, such other terms and conditions on its approval as it may find just and reasonable.[16]

The courts have sustained this view of the Act, holding that if complaints regarding the activity approved by the order come to the Board's attention, the Board is justified in reopening the case and considering the matter anew.[17]

Clearly, a complaint based upon subsequent or unforeseen anti-competitive effects would come within this sanction.[18] Thus, if an acquisition approved by the CAB does prove to have anticompetitive effects, the existing practice under the Act affords an adequate remedy for dealing with the problem.

Over and above this continuing surveillance of the CAB, if alleged anticompetitive effects of the transaction constitute a *violation* of the antitrust laws, the courts retain antitrust jurisdiction a all times to afford appropriate remedy, notwithstanding the Board's primary jurisdiction over interstate air commerce.[19]

Finally, the Supreme Court's recent decision in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 86 S. Ct. 781, 15 L. Ed. 709 (1966), makes clear that the courts retain antitrust jurisdiction even in the face of statutory anti-

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[9] *Atchison T. & S. F. Ry.* v. *Aircoach Transport Ass'n.*, 253 F. 2d 877, 887 (D.C. Cir., 1958); *McGovern, Antitrust Exemptions for Regulated Industries*, 20 Fed. B. J. 10, 15–17 (1960). Similarly, statutory immunity may not apply if the acquisition itself were pursuant to an illegal combination or conspiracy, particularly if the whole of the combination and conspiracy were never submitted to the CAB, or if the combination or conspiracy were of such a nature as to be beyond the authority of the regulatory agency to approve.

[10] 72 Stat. 769 (1958); 49 U.S.C. Sec. 1381 (1964).

[11] 52 Stat. 1028 (1938), 15 U.S.C. Sec. 45(a)(6) (1964). A specific deferral of antitrust responsibility to the Civil Aeronautics Board is contained in Section 5(a)(6) of the Federal Trade Commission Act, which exempts "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958".

[12] *Air Cargo, Inc.*, 9 CAB 468, 470 (1948). *See, Pan American World Airways* v. *United States*, 371 U.S. 296 (1963), where the Attorney General's complaint was dismissed on the ground that the CAB could cope with the matter under its authority over unfair competitive practices under Section 411, even though the matter had been pending in the courts for nine years and had been brought by the government in the first place at the urging of the CAB. Cf. *Pan American-Panagra Acquisition Case*, Order E–19789, pp. 7–8.

[13] *Pan American Acquisition of LACSA Case*, 35 CAB 343 (1962).

[14] *Air Freight Rate Investigation*, 9 CAB 340 (1948).

[15] *Ailes, op. cit.*, note 8.

[16] See *Eastern Air Lines, Remmert-Werner Acquisition*, Order E–25973 (1968), at p. 42, citing *Reeve Aleutian Airways, Acquisition of Reeve Alaska Airmotive*, 25 CAB 118 (1957); and See *Pan American Acquisition of LACSA Case*, 35 CAB 343 (1962).

[17] *McManus* v. *Civil Aeronautics Board*, 286 F. 2d 414, 419 (CA 2, 1961); *TWA* v. *Hughes*, 332 F. 2d 602, 608.

[18] See *Shulman-Western Joint-Loading Agreements*, 34 CAB 801 (1961), where the Board imposed subsequent conditions on its prior approval, based upon a third party complaint against anticompetitive effects later arising.

[19] *Slick Airways* v. *American Airlines*, et al., 107 F. Supp. 199, 210 (DNJ 1951), on reh. 107 F. Supp. 216; appeal dism., *sub nom. American Airlines, Inc.* v. *Forman*, 204 F. 2d 230 (3rd Cir.), cert. den., 346 U.S. 806, 74 S. Ct. 54, 98 L. Ed. 336 (1953), citing *Pennsylvania Water & Power Co.* v. *Consolidated Gas Electric L & P Co.*, 4 Cir., 184 F. 2d 552.

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trust immunity, where *damages* rather than an injunction are being sought, and the transaction in question is not "arguably lawful" under the administrative exemption from the antitrust laws.[20]

These limitations and qualifications of the antitrust exemption of Section 414 afford ample safeguards against any unintended anticompetitive effects of the proposed legislation.

2. The Existing Act Requires, and The CAB Gives Great Weight to Anticompetitive Factors In Considering Approvals Involving Immunity

The immunity provision of Section 414, like those of other regulatory statutes, does not displace the antitrust laws. Rather, the agency involved is required to accommodate the policies of the antitrust laws and those of the regulatory statute. The Supreme Court said in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 349 (1963):

"The difficult problem here arises from the need to reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating [actions] . . . which may well have anticompetitive effects in general and specific applications."

The court then suggested the procedure to answer the problem:

"[T]he proper approach . . . in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.* at p. 357

We start from the fundamental proposition that certain of the regulatory agencies, including the CAB,[21] are charged under the Clayton Act, Section 11, *with an affirmative duty to enforce that antitrust statute to the exclusion of the particular regulatory statute*, if the agency cannot grant antitrust immunity with respect to the particular transaction in question.[22]

Where the agency can imunize the transaction, the Supreme Court has held, in summary, that: (a) the agency *must* consider the policy of the antitrust laws as part of the "public interest" standard of the regulatory statute involved;[23] (b) the agency may base its denial of approval solely on grounds of the transgression of the principles and policies of the antitrust laws;[24] (c) an antitrust violation is substantial evidence standing alone that the transaction is contrary to the public interest, unless other evidence detracts from the weight of that factor;[25] and (d) the courts will exercise ultimate control to ensure that the agency has accorded the required consideration of antitrust policy, by reviewing the findings to determine if there is substantial evidence to support them.[26]

The Supreme Court's holding in the *Swedish American Line* case[27] has been viewed as portending an even more stringent standard of anti-competitive considerations, or applications thereof, by the agencies and the courts. This conclusion is supported by the recent decision of the Court of Appeals for the District of Columbia Circuit in *Northern Natural Gas Co.* v. *Federal Power Com-*

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[20] Cf. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F. 2d 441, 447 (CA 2, 1968) where the court found the arrangement *not* "arguably lawful" in view of its *per se* antitrust violation.

[21] The others are the FCC, ICC, and the Federal Reserve Board.

[22] *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 64 S. Ct. 370, 88 L. Ed. 544 (1943). Cf. *Mackey-Midet Acquisition Case*, 24 CAB 51; *Pan American-National Agreements*, 28 CAB 960.

[23] *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1943); *Far East Conference* v. *United States*, 342 U.S. 570 (1952); *Minneapolis & St. Louis RR* v. *United States*, 361 U.S. 173 (1959); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); Cf. *Denver & Rio Grande Western RR* v. *United States*, 387 U.S. 485, (1967), where the Court held that the ICC must consider anticompetitive effects even under a statutory provision which carried no antitrust immunity. *Id.* at p. 493.

[24] *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959). It is not necessary that the agency determine a *violation* of the antitrust laws; it is enough that the "principles and policies of the antitrust laws" are offended. See, *National Broadcasting Co.* v. *U.S.*, 309 U.S. 190, 223–224 (1943).

[25] *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien* (Swedish American Line), 390 U.S. 238 (1968).

[26] *Seaboard Airline RR* v. *United States*, 382 U.S. 154 (1965). There is an increasing tendency by the courts to invoke the "substantial evidence" rule to require additional agency justification for approvals involving antitrust implications. *See, Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 285 F. Supp. 949 (USDC, N.Y. 1968), citing the *Volkswagenwerk and Swedish American Line cases, supra*, as evidencing "a growing reluctance on the part of the Commission to grant immunity under the Shipping Act where to do so would grant immunity for an antitrust violation." *Id.*, at p. 956. Cf. *Northern Natural Gas Co.* v. *FPC, infra* p. 13.

[27] *Supra*, note 25.

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mission, 399 F. 2d 953 (1968), wherein the Court reversed and remanded to the FPC because of inadequate consideration of antitrust policy. The Court said:

"But because competitive considerations are an important element of the 'public interest', we believe that in a case such as this the Commission was obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important considerations." *Id.* at p. 961

Furthermore, it is interesting to note that the Court—contrary to the inference of the Justice Department's testimony before the Committee that the CAB may lack antitrust "experience"—clearly considered that administrative agencies are competent to deal with the antitrust issues involved in such review. Commenting on the bar's objections to having to deal with both the agency and Justice on antitrust issues, the Court said:

"It appears that this problem could be alleviated if the regulatory agencies were conscientiously to examine the antitrust implications of their actions, *thereby taking much of the burden from the Department of Justice. . . .*" *Id.* at p. 959, fn. 4, [Emphasis supplied]

In the view of the D.C. Court of Appeals, then the CAB is not only competent to deal with the various anticompetitive issues which may be presented, but can and should relieve the Attorney General of much of this burden in proceedings before the Board.

In practice, the CAB has always given full recognition to and consideration of the antitrust laws in passing upon transactions which would be immunized by the operation of Section 414.

In *Air Cargo, Inc.*, 9 CAB 468 (1948) the CAB gave recognition to the Supreme Court's decision in *McLean Trucking Co.*, and possibly went beyond that decision, for it stated:

"We are not bound by this [antitrust] decision in approving agreements under section 412 of the Civil Aeronautics Act. However, in making such a determination we cannot ignore the purposes of the antitrust laws. The Supreme Court has held that in conferring authority similar to that exercised by us under section 412, Congress neither made the antitrust laws wholly inapplicable nor authorized the administrative agency to ignore their policy. Also, since our approval of cooperative agreements between air carriers gives such agreements immunity under the Federal antitrust laws, we must be concerned with the objectives of those laws *as interpreted by the courts.*" [Emphasis added; footnotes omitted]

In the *Local Cartage Agreement Case*, 15 CAB 850 (1952) the CAB even went further and stated:

"The other basic consideration is that the Board, in determining whether an agreement is adverse to the public interest under section 412 of the Act, cannot ignore the question of whether such an agreement may run counter to the principles and purposes of the antitrust laws. The approval of an agreement under section 412 exempts the agreement from the operation of the antitrust laws by virtue of section 414. While this exemption demonstrates the Board's power to approve agreements which otherwise would violate the antitrust laws, it also imposes upon the Board, in determining the effect on the public interest of agreements for which approval is sought, the duty to evaluate such agreements in the light of antitrust policy and principles. *Where an agreement has among its significant aspects elements which are plainly repugnant to established antitrust principles, approval should not be granted unless there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits.*" [Emphasis added; footnotes omitted].

There is no question but that this early decision of the CAB is substantially the same as the recent Maritime Commission standard upheld by the Supreme Court in the *Swedish American Line* case. The Board has thus from the beginning demonstrated a very serious concern and regard for the enunciated antitrust principles and policies.[28] It is clear that the Board has placed on the proponent a "substantial burden" under its "serious transportation need" criterion. See, *IATA Credit Agreements*, 30 CAB 1553, 1555 (1960). It is likewise clear that

[28] To a similar effect, see: *IATA Credit Agreements*, 30 CAB 1553 (1960); *National Air Taxi Conference Agreement*, 37 CAB 774 (1963); *Prepaid Ticket Advice Resolution*, 31 CAB 1030 (1960); *Volumair Agreement*, 30 CAB 1007, 1009 (1960); *IATA Agreement* Order E–20348, p. 2; *IATA Agreement*, Order E–15020, p. 2; *North Atlantic Tourist Commissions Case*, 16 CAB 225.

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the CAB grants such immunity reluctantly, and only when convinced of the paramount need therefor. As noted in the *ATC Agency Resolution Investigation*, 29 CAB 258, 263 (1959):

"Although we are willing by our approval to exempt from the operation of the antitrust laws concerted action by carriers which is necessary [for efficiency and economy], we cannot extend the scope of such approval to activities calculated to restrict trade for a monetary saving which, viewed against the magnitude of the restraint, is insignificant." [Footnotes omitted]

The Board's concern for antitrust policy has been as far-reaching and all-inclusive as have the anticompetitive aspects of the various transactions it has considered. Thus, the Board has condemned concerted boycotts of third parties,[29] the apportioning of service between carriers in a given market,[30] the joint establishing of rates,[31] various restraints of trade [32] or diversion of traffic to other parties,[33] and a joint allocation of charter business on some basis other than "free play of competition." [34]

The Board in the absence of a showing of serious transportation need [35] has even denied approval where the Department of Defense has objected to the transaction as merely "*tending* to violate antitrust policies and principles."

The Board said:

"In the absence of such a showing, the Board is not prepared to approve, and thereby grant immunity from the antitrust laws, group-carrier activities with regard to the Defense Department's procurement program."

Similarly, even where it has approved a transaction as supported by a serious transportation need, the Board has in many cases imposed significant conditions on its approval, out of consideration for antitrust principles and policies. For example, in approving IATA cargo agency rules, the Board *excepted* their application within the United States, because it was "not consistent with the principles of the antitrust laws of the U.S. to grant immunity." [36]

Section 408(b) makes express provision for the CAB's imposing terms and conditions or "such modifications as it may prescribe" in approving a transaction as being in the public interest. In this respect, Section 408 differs from either Section 409 (interlocking relationships) or Section 412 (pooling and other agreements).[37]

An examination of the cases before the CAB involving anticompetitive considerations discloses that the Board, as noted previously, has always been extremely conscious of the antitrust implications, and as a result, has nearly uniformly imposed exacting conditions on its approval, if granted.[38]

Moreover, it is evident that the CAB's concern in these matters and the kinds of such conditions which it consequently imposes, are strongly affected by the position of the Department of Justice, and other interested persons. It is standard procedure for the Board to consult the Department of Justice regarding the antitrust aspects of matters involving antitrust immunity as a consequence of CAB

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[29] *IATA Credit Agreements*, 30 CAB 1553 (1960); *Local Cartage Agreement Case*, 15 CAB 850 (1952).

[30] *Pan American-Venezuelan Traffic Arrangements*, 34 CAB 800 (1961).

[31] *Eastern—Pan American—TCA Cargo Rates*, 35 CAB 887 (1962).

[32] *IATA Teletype Ticketing*, 30 CAB 1543 (1959); *ATC Agreements Teletype Ticketing*, 31 CAB 941 (1960).

[33] *Six Carrier Mutual Aid Pact*, 29 CAB 168 (1959).

[34] *Volumair Agreement*, 30 CAB 1007 (1960).

[35] *Technical Committee for Contract Administration*, CAB Order No. E–26171 (1967). The *"tend to"* test, moreover, is the fundamental test of the Clayton Act, barring stock or access acquisitions where "the effect may be substantially to lessen competition, or to *tend* to create a monopoly." 64 Stat. 1125 (1950), 15 U.S.C. Sec. 18 (1964). In using the Clayton Act standard, the CAB has gone far beyond the literal, and much narrower "monopoly" test required by Section 408(b). *Northwest Airlines, Inc.* v. *CAB*, 303 F. 2nd 395, 401 (DC Cir. 1962).

[36] *IATA Cargo Agency Rules*, CAB Order No. E–20348 (1964). Cf. *Western-Pacific Northern Merger*, E–25240, pp. 1, 2; *Air Freight Tariff Agreement Case*, 14 CAB 424, 425; *Emery Air Freight Corp., Declaratory Order*, Order E–22934, p. 2.

[37] Cf. *Pan American Airways, Inc., et al, Merger*, 2 CAB 503, 505 (1940); *United Air Lines Transport Corp.*, 1 CAA 739 (1940).

[38] See, e.g., *Air Cargo, Inc.*, 9 CAB 468 (1951); *Local Cartage Agreement Case*, 15 CAB 850 (1952); *Reeve Aleutian Airways, Acquisition of Reeve Alaska Airmotive*, 25 CAB 118 (1957); *Pan American Acquisition of LACSA Case*, 35 CAB 343 (1962); *Shulman-Western Joint-Loading Agreements*, 34 *CAB* 801 (1961); *National Air Taxi Conference Agreement*, 37 CAB 774 (1963); *Prepaid Ticket Advice Resolution*, 31 CAB 1030 (1960); *National Air Taxi Conference Agreement*, 37 CAB 774 (1963); *Hawaiian Airlines Interlocking Relationship*, 35 CAB 878 (1962).

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approval.[39] Section 408(b) of the Act expressly requires the CAB to notify persons known to have a "substantial interest in the proceeding" of the public hearing on applications for acquisition of control of an air carrier. The Board has viewed this provision as requiring it to notify the Attorney General, and has done so. It likewise deems the Attorney General to be a person entitled to object to a CAB order without hearing under the third proviso of Section 408(b).[40]

Included among the specific factors frequently considered by the Board in determining whether a proposed acquisition is consistent with the public interest, as required by Section 408(b), are (1) whether there would be a lessening or elimination of competition in any of the affected areas,[41] (2) whether there would be a conflict of interest between the two companies which might inure to the detriment of either.[42]

The Board has stated that, in considering Section 408 transactions, it regards its "general statutory guide" to the public interest as being found in the policy declaration section of the Act, Section 102.[43]

Section 102 provides:

"DECLARATION OF POLICY: THE BOARD

"Sec. 102. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity;

"(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, *or unfair or destructive competitive practices*;

"(d) *Competition* to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

It has already been noted that the CAB construes its authority over unfair competitive practices under Section 411 of the Act to comprehend activities violative of the Sherman Act.[44]

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[39] See, *Local Cartage Agreement Case*, 15 CAB 850, 851 (1952); *Six Carrier Mutual Aid Pact*, 29 CAB 168, Apx. B L9 (1959); *Consolidated Airline Purchasing Corp., Order Approving Agreement* (1963).

[40] Testimony of Chairman John H. Crooker, Jr., before House Transportation Subcommittee on H.R. 8261, H.R. 8322 and H.R. 8323, Relating to Stock Control of Airlines, March 25, 1969, p. 9.

[41] See, e.g., *American Airlines Acquisition of Mid-Continent Airlines*, 7 CAB 365 (1946); *Eastern Airlines, Rommert-Werner Acquisition*, Order E–25973 (1968).

[42] See, e.g., *Maytag & Frontier Airlines, Inc., Approval of Control*, 27 CAB 756, 760 (1958); *The Florida Case*, 6 CAB 765, 790 (1946).

[43] 49 U.S.C. 1302 [Emphasis supplied]. "Public interest" as used in the Act is not a mere general reference to public welfare but has a direct relation to definite statutory objectives as outlined in Section 102 (formerly section 2): *Acquisition of Western Air Express by United Air Lines*, 1 CAA 739, 740 (1940); *Acquisition of Marquette by TWA*, 2 CAB 1, 4 (1940); *Pan American Airways, Inc., et al., Merger*, 2 CAB 503, 505 (1940); *Marine Airways-Alaska Transport Consolidation*, 3 CAB 315, 318 (1942); *Pan American-Matson-Inter-Island Contract*, 3 CAB 540, 545 (1942); *Western Air Lines, Acquisition of Inland Air Lines*, 4 CAB 654, 656 (1944); *Acquisition of Mayflower Airlines, Inc. by Northeast Airlines, Inc.*, 4 CAB 680, 681 (1944); *Acquisition of Cordova Air Service by Alaska Airlines, Inc.*, 4 CAB 708, 709 (1944); *Northern Consolidated Airlines, et al, Consolidation*, 8 CAB 110, 111 (1947); *Pacific Northern Airlines, Certificate Transfer*, 8 CAB 217, 221 (1947); *IATA Agreement, North Atlantic Fares*, 10 CAB 330, 331 (1949); *Air Freight Tariff Agreement Case*, 14 CAB 424, 425 (1951); and *ATC Agency Resolution Investigation*, 29 CAB 258, 308, 309 (1959); *Central Airlines, Inc., Merger*, Order E–25626, p. 3.

[44] *Air Freight Rate Investigation*, 9 CAB 340 (1948).

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In addition to these general statutory guides to the CAB, Section 408(b) expressly *prohibits* the Board from approving an acquisition as being in the public interest in the following circumstances:[45]

"Provided, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competion or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control . . ."

As the CAB views this Proviso, the Board will approve an acquisition of control of an air carrier unless "we find it to be inconsistent with the public interest *or* that it comes within the other limitations of the section.[46] Thus, once the Board determines that the monopoly and competitive restraint criterion of 408(b) is transgressed, it cannot approve the acquisition. In applying the criterion of the Proviso, the Board in practice has actually considered whether the transaction results in creating a monopoly *or* restraining competition or jeopardizing another air carrier.[47]

Moreover, as pointed out by Judge Friendly, in the Second Circuit decision cited by the Department of Justice in its testimony, the Board has actually applied broader antitrust concepts than required by a narrow reading of the First Proviso of Section 408(b), by relying on the general public interest tests of Section 102 of the Act:[48]

"However, the Board has escaped the straitjacket that would have been imposed by reading the proviso as a limit on its consideration of competition in passing on applications under § 408. It has properly concluded, in light of the immunity from the antitrust laws conferred by § 414, that it must consider anticompetitive effects less extreme than those limned in the proviso in determining whether the transaction will be 'consistent with the public interest' as defined in § 102, see, e.g. *American Airlines, Acquisition of Control of Mid-Continent Airlines*, 7 C.A.B. 365, 371–372, 377–378 (1946)."

Judge Friendly added,

"The true construction of § 408(b) as to transactions with anticompetitive effects thus is that the Board cannot approve a transaction if its effects will be so extreme as to violate the proviso but must approve others if, but only if, it finds the disadvantage of any curtailment of competition to be outweighed by 'the advantages of improved service.' *McLean Trucking Co.* v. *United States, supra*, 321 U.S. at 87, 64 S. Ct. 370, 88 L. Ed. 544." Id. at p. 519.

The Board has also interpreted Section 408 as sanctioning temporary or interim relief where required in the public interest, despite the fact that the statute does not expressly provide for these measures. Thus, it has employed, where warranted by the public interest, *summary* procedures, similar to those it has employed in the establishing of temporary mail rates, notwithstanding the express requirement of Section 408 for a hearing.[49] The Board has relied on the broader provisions of Section 204(a) and the Section 1001 of the Act[50] for this purpose, as well as Section 102.

Finally, the Board has exercised conservatism and restraint in disclaiming jurisdiction of transactions under Section 408, and in exempting such transactions from the requirements of Section 408 pursuant to the exempting authority con-

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[45] 49 U.S.C. 1378(b).

[46] *Pan American Airways, Inc., et al., Merger*, 2 CAB 503, 505 (1940). Cf., *North Central Airlines, Inc.* v. *Civil Aeronautics Board*, 265 F. 2d 581, 584 9 (C.A. D.C. 1959), cert. den., 360 U.S. 903 (1959); *Northwest Airlines* v. *Civil Aeronautics Board*, 303 F. 2d 395 (C.A. D.C. 1962).

[47] See, *The Flying Tiger Line, Inc.—Mercury General American Corp. Acquisition*, Order E–23062, p. 6; Cf. *Eastern-Mackey Merger Case*, Order E–24427 & E–24428, p. 6; *Western Truck Leasing Co., Control and Interlocking Relationships*, Order E–26114, p. 3.

[48] *Butler Aviation Company* v. *Civil Aeronautics Board*, 389 F. 2d 517, 519 (1968).

[49] *Toolco-Northeast Control Case*, 34 CAB 583, 588 (1961).

[50] See, 49 U.S.C. 1324 (a), which provides,

> "The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under this Act."

Similarly, Section 1001, 49 U.S.C. 1481, provides in pertinent part that the Board may conduct its "proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice".

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tained in Sec. 416(b) of the Act.[51] Thus, the Board has denied "retroactive waivers" of its rules respecting purchase of air carrier stock during a period in which such transactions were prohibited;[52] it has denied requested disclaimers of jurisdiction of transactions under Section 408;[53] and has denied waiver of its "Sherman Doctrine" requiring divestment of premature acquisitions prior to any CAB consideration.[54]

Clearly, the CAB has given close scrutiny to the anticompetitive effects of transactions which would receive antitrust immunity as a result of its approval. Contrary to the inference of the Justice Department that such scrutiny, being under the "public interest standard of the Aviation Act" results in the "application of different legal tests" than under the antitrust laws,[55] it is equally clear that the CAB has given very great weight to the principles and policies of the antitrust statutes.

3. Under Section 408 the CAB May and Does Consider Anticompetitive Effects Other Than in Air Transportation

The Department of Justice argues that "the acquisitions to be reached by the proposed bills are basically different from the acquisitions now subject to the Aviation Act." Justice maintains that under the proposed legislation, "anticompetitive effects outside the air transportation industry either would receive no scrutiny at all, or would be considered only by an agency with no experience in or responsibility for the maintenance of competition outside of air transportation."

It is not believed that this is an accurate statement of the scope of the CAB's consideration of anticompetitive issues under the existing Act. Under Section 408(a)(5) the CAB must consider acquisitions of control of air carriers, not only by other air carriers, but by persons controlling an air carrier, by "other" common carriers, and by persons engaged in a phase of aeronautics.

Clearly, the Board, for reasons previously stated, may consider any anticompetitive effects of the acquisition on the acquirer as well as on the acquired air carrier. On its face, Section 408(a)(5) now embraces acquirers who are not within "air transportation". The Board has held, e.g., that a "person controlling an air carrier" under Section 408(a) does not itself make such person an "air carrier".[56]

In the case of acquisitions by "other common carriers" the CAB plainly is called upon to deal with companies outside of air transportation, or even outside of transportation. While railroads, motor carriers, and water carriers are clearly within the contemplation of the statute, it would appear that non-transportation carriers (e.g., communications common carriers) might also be within the statute.

That Congress so intended is evidenced by the special definitions and statutory qualifications placed on the term "common carrier" as used in regulatory statutes other than the Aviation Act. The term is not defined in the Federal Aviation Act. But the other regulatory statutes define the common carrier contemplated in the statute, and the Communications Act expressly negates application to any other common carrier "not subject to this chapter".[57] All but the

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[51] 49 U.S.C. 1386(b). See *Trans-Caribbean Airways, Interlocking Relationships*, 34 CAB 777, 780 (1962). The CAB view is that under either a 416 exemption or a disclaimer of jurisdiction under 408, no antitrust immunity is conferred by Section 414. At least one commentator indicates that a 416 exemption order is a form of "approval" and would thus receive immunity under Section 414. Ailes, "Regulated Industries and Antitrust," 32 A.B.A. Antitrust L. J. 218, 223.

[52] See *Central Airlines, Inc., Mail Rates*, E–21930, p. 1.

[53] See *Drake Motor Lines, Inc.*, Order E–23810, p. 3; *Hughes Tool Company, Acquisition of Control—Trans World Airlines, Inc., Order* E–21057, p. 4. Cf., *Universal Consolidated Industries, Inc., Disclaimer of Jurisdiction*, Order 68–12–86, p. 2. Similarly, the Board has later asserted 408 jurisdiction once disclaimed, where the *modus operandi* had changed. See *Minnesota Enterprises, Inc. & Edward L. Murphy, Jr., Application*, E–24942, p. 2, E–378; E–19014.

[54] *National Airlines, Inc., Control and Interlocking Relationships*, Order E–20701, p. 2.

[55] The suggestion has been made, in fact, that the opposite is true: viz., that although some lip service is paid to the principle that consideration be given to the expression of Congressional intent in the regulatory statutes, this does not, in practice, "appear to play any significant role." See Schwartz "Legal Restrictions of Competition in Regulated Industries," 67 Harv. L. Rev. 436, 441–443 (1954).

[56] *Air Line Pilots Ass'n., International* v. *Gulf American Land Corp.*, E–24642, p. 2.

[57] See Attachment A hereto which sets forth columnar comparisons of the definitions of common carrier contained in the Safety Appliance Act, the Federal Communications Act, and the three Parts of the Interstate Commerce Act.

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Water Carrier Act were in being when the Civil Aeronautics Act was being considered. Thus, Congress, fully aware of the language it had used historically [58] to limit jurisdiction by various agencies to defined types of common carriers, did not elect so to limit the definition of "common carrier" which the Board was to consider in Section 408 and 409 cases.[59]

In deciding whether Congress has conferred jurisdiction on an agency, the courts have frequently adverted to Congress' conscious selection of differing language in successive regulatory acts.[60] Under this test, the CAB is not limited to *transportation* "common carriers" in considering acquisitions of control of an air carrier.

Nor has the Board regarded itself as limited. It has in practice gone beyond the bare statutory provision for approval of acquisitions of an air carrier by "other common carriers". Thus, although Section 408(a) does not in terms forbid *a person controlling* such "other common carrier" to acquire control of an air carrier without CAB approval, the Board has nevertheless, as a general rule, held Section 408(a)(5) applicable to such an acquisition.[61]

Similarly, while Section 408 does not *in haec verba* make unlawful the acquisition of control of a surface carrier by an air carrier without CAB approval, the Board has held that "the plain intent" of Congress was to make unlawful any acquisition under which an air carrier and "another common carrier" become subject to "unified control", and has taken jurisdiction of such acquisitions under Section 408.[62]

In the case of acquisitions by "persons engaged in any other phase of aeronautics" the CAB's jurisdiction under Section 408(a)(5) is even broader, and potentially more removed from strict considerations of effects in air transportation.

A notable example of CAB concern with anticompetitive effects "outside of air transportation" resulting from an acquisition of control under Section 408 is found in the very case cited (in another context) by the Department of Justice: *Butler Aviation Company et al.* v. *Civil Aeronautics Board.*[63] In that case, the CAB under Section 408 approved, after hearing, the acquisition by an air carrier of a "fixed base operator" which was also engaged in the sale of business jet and short-takeoff utility aircraft. The acquisition was strongly opposed by competing fixed base operators and aircraft sales outlets. The Antitrust Division of the Department of Justice was also allowed to intervene.

In considering whether to approve the acquisition, the CAB made [64] extensive determinations of the anticompetitive effects, not only in the air transport field, but in the aviation service industry and in the business jet aircraft industry. The Examiner and the Board found that the acquisition would not restrain competition or create a monopoly in either of the nontransport industries involved.

It is interesting that on judicial review (by one of the competing opponents of the acquisition), the Department of Justice Antitrust Division filed the Government's brief,[65] in which it is not only acknowledged, but emphasized, that the CAB in passing on the acquisition had fully and properly considered the anticompetitive effects *outside of air transportation.*

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[58] Some of it quite recently, as in the case of the Motor Carrier Act of 1935.

[59] Congress, moreover, returned to a restricted definition of common carrier immediately following the Civil Aeronautics Act of 1938, in the Water Carrier Act of 1940. Cf. Attachment A.

[60] *Alaska Airlines* v. *Civil Aeronautics Board,* 257 F. 2d 229, 230 (CADC, 1958); *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Board,* 302 F. 2d 875, 880 (CADC, 1962); *Alcoa Steamship Company, Inc.* v. *Federal Maritime Commission,* 348 F. 2d 756, 758 (CADC 1965). See also, *Border Pipe Line Co.* v. *Federal Power Commission,* 171 F. 2d 149, 151 (CADC 1948).

[61] *Transportation Corporation of America,* E–20785, p. 4, citing *Air Freight Forwarder Case,* 9 CAB 473 (1948); *Minnesota Enterprises, Inc. & Edward L. Murphy, Jr., Application,* E–24942, p. 2.

[62] *Trans-Caribbean Airways, Interlocking Relationships,* 34 CAB 777, 779 (1961); *Trans-Caribbean Airways,* 37 CAB 710, 712 (1962).

[63] The proceeding before the CAB is embodied in Board Order E–25973, *Eastern Air Lines, Remmert-Werner Acquisition* (1968), 389 F. 2d 517 (C.C.A., 2d Cir., 1968).

[64] The CAB actually declined review of the Examiner's decision. Under Reorganization Plan No. 3 of 1961, 75 Stat. 837, 49 U.S.C. 1324, this makes the examiner's initial decision the action of the Board for all purposes, including appeal and review. *F.T.C.* v. *Flotill Prods., Inc.,* 386 U.S. 1003 (1967).

[65] *Butler Aviation Co.* v. *C.A.B.,* No. 31, 884, U.S. Court of Appeals for the Second Circuit, *Brief for Respondent.*

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The Department of Justice said,[66]

"Contrary to the suggestion of Lear (Lear Br. 28), the examiner did not hold that the restraint of competition forbidden by Section 408(b) is limited to the control of air transportation. Indeed, at the outset of the proceedings, when Eastern and R–W filed answers in opposition to Lear's motion to intervene on the theory that restraint of competition was limited to the field of air transportation, the Board permitted the intervention with instructions that the issue be fully explored. Subsequently, when Eastern moved to exclude from consideration any issue of restraint of competition in the field of sales of general aviation aircraft, the examiner denied that motion (Tr. 159). As a result, the question of whether Eastern's acquisition would have an effect on either the business jet aircraft or aviation service industry was fully explored, and the examiner concluded that the acquisition would not substantially lessen competition or tend toward a monopoly 'in air transportation, the executive aircraft industry . . . or in the aviation service . . .' (Tr. 1905). He therefore found it unnecessary to pass upon the jurisdictional issue. In our view, his conclusion is supported by the record." [Footnotes omitted]

The Department of Justice pointed out that the Examiner had devoted over 12 pages of his initial decision to a discussion of the "legal and factual problems presented by a consideration of the anti-trust laws", the Supreme Court having held that a "five-page consideration of anticompetitive contentious surrounding the merger involved in *Minneapolis* v. *St. L. Ry. Co.*, 361 U.S. 173, at 188 (1960) was deemed 'extensive'."[67]

The Department of Justice also stressed in its brief that the business jet and aviation service industries in the *Butler* case are not related in any substantial degree to *"air transportation"*.[68] And it fully supported[69] the CAB's distinguishing the case, on anticompetitive considerations, from the Supreme Court's decision in the leading antitrust case of *Federal Trade Commission* v. *Procter & Gamble Co.*[70]

Finally, Justice agreed in its brief in the *Butler* case with the CAB's refusal to attach a condition to its approval of the acquisition under which the parties would have *waived* their antitrust immunity given by Section 414.[71] In supporting the propriety of the CAB's refusal to attach this condition, the Government's brief stressed that "Butler or anyone else claiming injury will still have an opportunity to bring a treble damage action against Eastern on the ground that the acquisition violates the antitrust laws."

To this it added,

"In such proceeding, if Eastern should depend on the ground that Section 414, coupled with the Board's order, grants it immunity, the trial court will have an adequate opportunity to determine, as a matter of law, the scope of immunity flowing from the Board's order. Contrary to Butler's assertions, there is nothing in the Board's order which prevents Butler from 'taking advantage of their right to private antitrust enforcement'. Whatever immunity Eastern secures as a result of the Board's order will be the immunity conferred by Congress in Section 414, which the Board is not at liberty to change." [Footnotes omitted]

The *Butler* case is not extraordinary. In other situations, the Board has given consideration to the anticompetitive effects of the transaction outside of air transportation, and has acted appropriately. Thus, in *Consolidated Airline Purchasing Corp., Order Deferring Action on Agreement*, Docket 14589, June 21, 1963, the Board approved the transaction, saying:

"Although there is no present indication that circumstances will, in fact occur where quantity purchases by CAPCO of a particular item have a significant impact on others participating in the market, the Board may further condition its order of approval herein as necessary. *In this connection, the Board anticipates that it will be guided by the advice of the Justice Department as to the competitive pattern in industries with which the Board is not familiar.*" [Emphases added]

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[66] *Id.* at p. 18.
[67] *Id.*, at p. 16.
[68] *Id.*, at p. 28.
[69] *Id.*, at p. 28–37.
[70] 386 U.S. 568 (1967).
[71] *Id.*, at p. 44. Note, however, that it is the Second Circuit's upholding of this aspect of the CAB's determination on judicial review to which Justice now objects in its testimony before the Committee.

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Following the Board's order, the Department of Justice filed a statement with the Board, expressing concern over "the possible competitive impact upon industries *other than air transportation*" which might arise from the CAB's limiting successive purchases of the same commodity to only $100,000. Deferring to Justice's views, the Board thereupon imposed an additional, and much more stringent condition, on its approval, saying:

"The Board previously recognized the possible antitrust implications of quantity purchases by CAPCO and accordingly tentatively concluded that a limitation of $100,000 should be imposed upon any single purchase. In view of the comments made by Justice, we have decided that a further condition should be imposed to provide that successive quantity purchases of the same item from a single source should not exceed $250,000 in value in any one calendar year. We believe this additional restriction will achieve the same objectives as those contemplated in Justice's proposed condition and at the same time afford CAPCO a reasonable scope and flexibility of operations."

This action by the Board rested squarely on considerations of the anticompetitive effects of the arrangement on industries outside air transportation, and "with which the Board is not familiar".

In the very case cited by Justice, of the "large and diverse conglomerate" with $3 billion annual sales which controls an air carrier, the Board dealt with the potential anticompetitive effects of the acquisition of the carrier under Section 408, not solely with respect to air transportation, but as between aircraft manufacturers.[72]

Indeed, it would appear that in the vast majority of transactions involving "persons engaged in any other phase of aeronautics" the Board, by the very breadth of the classification, would be dealing with potential anticompetitive effects outside of air transportation. This is the almost inevitable result of the very broad holdings of the Board as to when an entity is a "person engaged in a phase of aeronautics." [73]

In sum, the CAB is constrained by the existing sanctions, if not requirements, of the Act, as interpreted and applied by the Board and the Courts, to give full consideration to anticompetitive factors both within and without air transportation. The Board, moreover, has done so in practice, with the active participation of the Department of Justice.

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[72] *Ling Temco-Vought, Inc., Acquisition of Braniff International,* Docket No. 18940, Order No. E–25989, November 17, 1967. See also *United States Lines* v. *CAB,* 165 F. 2d 849 (CA 2, 1948) considering competitive effects on foreign steampship operators *McManus* v. *CAB,* 286 F. 2d 414, 419 (CA 2, 1961), dealing with competitive effects among travel agents.

[73] The Board has held these entities to be engaged in a "phase of aeronautics":

a. Ownership and leasing of aircraft and engines: *Overseas National Airways,* 24 CAB 827, (1956); *Los Angeles Air Service, Inc., et al, Control and Interlocking Relationships,* 26 CAB 43 (1957); *Resort Refinancing Case,* 26 CAB 578 (1958); *American Airlines, Exemption,* 27 CAB 1112, (1958); *Purchase by Galco of American Airlines DC–7 aircraft,* 28 CAB 952 (1959); *Seaboard & Western Airlines, Inc., and Airborne Carriers, Inc., Acquisition and Control,* 29 CAB 1289 (1959); *Western Air Lines, Exemption,* 29 CAB 1311 (1959).

b. Travel Agency: *Frank V. Gandola, William E. Geiselman and Airborne Coordinators, Interlocking Relationships,* 24 CAB 592 (1957).

c. Oil Company Selling Aviation Fuel: *Flight Enterprises, Inc., and Transocean Corporation of Caifornila, Control of Bradley Flying Service, Inc.,* 27 CAB 562 (1958).

d. Specialized Packing Company for Two Family-Owned Freight Forwarders: *Barnett International Forwarders, Inc., et al, Interlocking Relationship,* 25 CAB 54 (1957); but see *Barnett International Forwarders, Inc., and Barnett International Airfreight Corp., Application for Approval of Interlocking Relationships,* 23 CAB 760 (1956).

e. Manufacturer of Aircraft Tires: *Frontier Airlines, Inc., Acquisition of Control by RKO General,* 41 CAB 498 (1964).

f. Aircraft Refueling Company: *National Airlines, Inc., and Lewis B. Maytag, Jr., Interlocking Relationships,* 40 CAB 161 (1964); *Flight Enterprises, Inc., and Transocean Corporation of California, Control of Bradley Flying Service, Inc.,* 27 CAB 562 (1958).

g. Aircraft Parts and Supply: *Robert C. and Janice M. Reeve, Reeve Aleutian Airways, Inc., et al, Acquisition, Interlocking and Control Relationships,* 16 CAB 100 (1952).

h. Military Aircraft Overhaul: *Flight Enterprises, Inc. and Transocean Corporation of California, Control of Bradley Flying Service, Inc.,* 27 CAB 562 (1958).

i. Sales and Management Consultant in Air Freight Forwarding: *Emery Air Freight, Interlocking Relationship,* 29 CAB 1351 (1959).

j. Research Corporation Created by Four Air Carriers to Formulate Air Cargo Development Program: *W. A. Patterson, et al, Interlocking Relationships,* 3 CAB 711 (1942).

k. Aircraft Ferrying Organization: *Pan American Airways, Inc., Acquisition of Pan American Airways-Africa, Ltd.,* 3 CAB 32 (1941).

l. Holding Company Deemed Engaged in the Aeronautical Activities Of Its Subsidiaries: *American Export Airlines, Inc., Acquisition of TACA, S.A.,* 3 CAB 216 (1941).

m. Individual Persons Holding Major Portion of Stock of Aviation Company: *Central Airlines, Inc., Control Case,* 10 CAB 538 (1949).

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Taken with the entremely limited scope of the immunity given by Section 414, there is no sound basis for the Department of Justice's proposed amendments to limit the scope of Section 414.

Safety Appliance Act

§ 20. *Who included in term "common carrier."*

The term "common carrier" as used in sections 17 and 18 of this title shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier. (May 30, 1908, ch. 225, § 5, 35 Stat. 476.)

§ 22. *Inspection of locomotives and appurtenances; definitions.*

When used in sections 23–34 of this title, the terms "carrier" and "common carrier" means a common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the Interstate Commerce Act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation. The term "railroad" as used in said sections shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employees" as used in said sections shall be held to mean persons actually engaged in or connected with the movement of any train. (Feb. 17, 1911, ch. 103, § 1, 36 Stat. 913; June 7, 1924, ch. 355, § 1, 43 Stat. 659.)

[Safety Appliance Acts—Sections, chapters, etc. listed above.]

Communications Act

§ 153. *Definition.*

For the purposes of this chapter, unless the context otherwise requires—

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

[Communications Act—June 19, 1934, ch. 652, 48 Stat. 1064.]

Railroads

§ 1. *Regulation in general; car service; alteration of line.*

(3) *Definitions.*—(a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier". The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

[Interstate Commerce Act—February 28, 1920, ch. 91, § 400, 41 Stat. 474.]

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MOTOR

§ 303. *Definitions and exceptions.*

(a) *Definitions.*—As used in this chapter—(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

[Part II of the Interstate Commerce Act—August 9, 1935, ch. 498, 49 Stat. 493.]

WATER

§ 902. *Definitions.*

For the purposes of this chapter—(d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

[Part III of the Interstate Commerce Act—September 18, 1940, ch. 722, Title II, § 201, 54 Stat. 929.]

Senator CANNON. On this exemption, you made a proposal here allowing exemption of noncertificated carriers. What about the situation of the nonscheduled? Are you including supplementals there?

Mr. STEPHEN. We are including supplementals as certificated carriers, so that the legislation would apply to the certificated scheduled airlines and to the certificated supplemental airlines.

Senator CANNON. But you would exempt the air taxi?

Mr. STEPHEN. It could exempt air taxi operators and similar operators.

Senator CANNON. Do you have anything further on that, Senator Cotton?

Senator COTTON. I have no questions.

Senator CANNON. Senator Hansen?

Senator HANSEN. I have no questions.

Senator CANNON. Thank you very much.

Mr. STEPHEN. Thank you.

Senator CANNON. That concludes our witness list for today.

The committee will stand adjourned.

(Whereupon, at 12:35 p.m., the committee was adjourned.)

(The following material was subsequently furnished:)

MAY 28, 1969.

HON. HAMER H. BUDGE,
Chairman, Securities and Exchange Commission,
Washington, D.C.

DEAR CHAIRMAN BUDGE: The Committee on Commerce recently reported favorably to the Senate S. 1373 with an amendment in the nature of a substitute text. As you will note from the enclosed copy of the bill as reported, the substitute text includes the language suggested by the Civil Aeronautics Board by which acquisition of 10% or more of any class of stock, or the capital of an air carrier, would create a presumption of control. However, by the terms of the bill the Civil Aeronautics Board could exempt any transaction from the prior approval requirement and thus the impact of the presumption, and as well adopt appropriate procedures to expedite consideration even if a total exemption were not granted.

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Subsequent to the reporting of the bill some concern has developed within the aviation industry about the impact of the 10% presumption of control section. It has been asserted that to have the presumption apply to acquisition of non-voting stock would be an unreasonable burden on the CAB and may inhibit potential financial support for air carriers. Accordinngly, an amendment has been suggested that would have the effect of limiting the presumption of control to ownership of 10% or more of "the aggregate of all classes of the voting stock of an air carrier or capital of an air carrier". I have enclosed a copy of the suggested amendment.

We are aware that there are various types and classes of stock utilized by the air carriers and are concerned about the distinction between voting and non-voting stock so far as actual control of an air carrier is involved. It seems that varying capitalization forms may affect the legal impact as well as practical impact of the language of the suggested amendment.

The advice of the Securities and Exchange Commission pertaining to the effect of the proposed amendment with regard to the various types of security interests utilized in the aviation field would be most helpful to our consideration of the merits of the suggested amendment.

Best regards.

Sincerely yours,

WARREN G. MAGNUSON, *Chairman.*

AMENDMENT TO S. 1373

At Page 3, Line 18, strike all of Paragraph 4 and in lieu thereof insert the following:

(4) Section 408 is further amended by adding the following new subsection 408(f):

"For the purposes of this section any person owning beneficially 10 per centum or more of the aggregate of all classes of the voting stock of an air carrier or capital of an air carrier shall be presumed to be in control of such air carrier unless the Board finds otherwise."

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., June 6, 1969.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of May 28 regarding S. 1373. As indicated in the Committee Report, the purpose of the bill is to assure that no one will acquire control of an air carrier without prior approval of the Civil Aeronautics Board unless the Board grants an exemption.

As you point out, to accomplish this purpose without unnecessary obstruction of airline financing, or undue complications in the statute, presents some difficulties because of the variety of ways in which control of a company may be obtained and the great variety of capital structures which air carriers may have.

Similar problems confronted the draftsmen of the Public Utility Holding Company Act of 1935 and the Investment Company Act of 1940. In both statutes the concept of "control" is important. In some instances, the question of whether or not a company has to register under the statute and become subject to regulation thereunder, depends upon the presence or absence of control relationships between it and other companies. Both the Holding Company Act and the Investment Company Act deal with the problem of defining "control" in a manner rather similar to that chosen in S. 1373. They refer to "control" as meaning control in fact, in a manner similar to Section 408(a)(5) of the Federal Aviation Act as proposed to be amended by Section 2 of S. 1373, and then they create a presumption that a person owning a specified percentage of the voting securities of a company is in control unless the Commission determines otherwise. For the sake of clarity, both of these Acts also define the term "voting security." The definition contained in Section 2(a)(40) of the Investment Company Act of 1940 reads in pertinent part as follows:

"(40) 'Voting security' means any security presently entitling the owner or holder thereof to vote for the election of directors of a company. A specified percentage of the outstanding voting securities of a company means such amount of its outstanding voting securities as entitles the holder or holders thereof to cast

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said specified percentage of the aggregate votes which the holders of all the outstanding voting securities of such company are entitled to cast. . . . "

Section 2(a)(17) of the Public Utility Holding Company Act of 1935 is similar. In general, our experience with this approach has been satisfactory.

It is true, as you point out, that control of a company can be acquired in other ways than through the ownership of voting securities. Indeed, it can be acquired without the ownership of any securities, as, for example, by a management or other contract. It remains true, however, that the usual method of acquiring control of a company is to acquire a controlling block of voting securities and to utilize the voting power so obtained to take over control of the board of directors and the management. We believe, therefore, that for the purposes of a presumption based on the ownership of securities, such as that proposed to be provided in new subsection (f) of Section 408, as added by Section 4 of S. 1373, reference to voting securities, as is done in the corresponding presumptive provisions of the Holding Company Act and the Investment Company Act, would be satisfactory. It would, for example, be somewhat unreasonable to presume the existence of control because of the ownership of 10 per cent of a small class of nonvoting preferred stock which might be an insignificant part of the total capitalization of the air carrier and carry little or no influence in its management and, as the aviation industry has apparently represented to you, this might interfere with airline financing without corresponding protection against a change in control. In the relatively unusual situation where control may be acquired otherwise than through the ownership of voting securities, the general prohibition to be contained in amended Section 408(a)(5) would appear to meet the problem. The purpose of the presumption is to provide certainty in the relatively common situation where a person makes a relatively significant investment in securities of a carrier and needs to know whether or not this may place him in violation of amended Section 408(a)(5) of the Federal Aviation Act of 1958. Thus, we see some merit in the suggested amendment to S. 1373 which you enclosed.

On the other hand, that amendment, as it stands, is somewhat ambiguous. It is not clear whether "owning beneficially 10 per centum or more of the aggregate of all classes of the voting stock of an air carrier" means ownership of stock having 10 per cent of the vote, or ownership of 10 per cent of stock having some type of voting power, whether or not this ownership carries 10 per cent of the vote. For example, if a carrier has outstanding a thousand shares of common stock having one vote per share and a thousand shares of preferred stock having ten votes per share, it would not be clear whether ownership of a hundred shares of each class would create the statutory presumption or whether the presumption would arise only from ownership of shares having, in the aggregate, eleven hundred votes. The significance of the words "or capital" in the proposed amendment is also unclear. The term "capital," when used with respect to corporations, apparently means, in some instances, all of the outstanding capital stock, whether or not voting, while in other contexts it is said to refer to the assets or property of the corporation.

I attach hereto a copy of a proposed revision of Paragraph (4) of S. 1373 which might be used in case your Committee should conclude to follow the general pattern found in the Public Utility Holding Company Act of 1935 and the Investment Company Act of 1940.

I hope that the foregoing will be of some assistance and if we can provide any further help, please let us know.

Sincerely,

HAMER H. BUDGE, *Chairman.*

AMENDMENT TO S. 1373

At Page 3, Line 18, strike all of Paragraph 4 and in lieu thereof insert the following:

(4) Section 408 is further amended by adding the following new subsection 408(f):

"For the purposes of this section, any person owning beneficially 10 per centum or more of the voting securities of an air carrier shall be presumed to be in control of such air carrier unless the Board finds otherwise. As used herein, beneficial ownership of 10 per centum of the voting securities of a carrier means ownership of such amount of its outstanding voting securities as entitles the holder thereof to cast 10 per centum of the aggregate votes which the holders of all the outstanding voting securities of such carrier are entitled to cast."

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CIVIL AERONAUTICS BOARD,
Washington, D.C., June 27, 1969.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your staff has requested the Board's views on the Securities and Exchange Commission's suggested revision of a proposed amendment of S. 1373 as reported. The amendment in question, on which the Board commented by letter dated June 10, proposes to modify S. 1373 by limiting the presumption of control (Section 4) to cases involving 10 percent of "the aggregate of all classes of the voting stock of an air carrier or capital of an air carrier * * *." The Securities and Exchange Commission proposes substitute language for the purpose of eliminating an ambiguity and deleting the phrase "or capital."

The Board has no objection to the substitute language proposed by the Securities and Exchange Commission, except for the deletion of the term "or capital." The primary purpose of the suggested language is to clarify that the presumption of control applies only to ownership of voting stock having 10 percent of the total vote. It does not apply to ownership of 10 percent of the aggregate number of shares having some type of voting power, if the shares owned do not carry 10 percent of the vote. Conversely, the presumption applies to ownership of less than 10 percent of the aggregate number of voting shares if the shares owned carry 10 percent or more of the vote. This clarification appears in keeping with the purpose of the proposed amendment of S. 1373, to which the Board had no objection.

The Board, however, suggests that the Securities and Exchange Commission's proposed language be modified to read: "* * * any person owning beneficially 10 per centum or more of the voting securities *or capital, as the case may be,* of an air carrier shall be presumed to be in control of such air carrier unless the Board finds otherwise. * * *"

The phrase "or capital" appears in Section 407 of the Act, S. 1373 as reported, and the proposed amendment of S. 1373. The purpose of the phrase is to cover ownership interests in air carriers which are not organized as corporations and which do not have stock, voting or otherwise. Not only does the Act define "air carrier" to include "an individual" or "a partnership," as well as a corporation [§ 101(3) and (13)], but many air carriers such as air taxi operators and air freight forwarders actually operate as single proprietorships or partnerships. While the Board's regulations exempt air taxi operators and air freight forwarders from Section 408 for the most part, they do not exempt other persons acquiring such carriers from the need to comply with Section 408. To eliminate the "or capital" provision would thus cause an undesirable gap in S. 1373's coverage.

The Securities and Exchange Commission is of the opinion that the significance of the words "or capital," as used in the proposed amendment, is unclear. In suggesting that the reference be to voting securities "or capital, as the case may be," the Board notes that the quoted language is now used in Section 407. In any event, the legislative history can clarify the significance of the phraseology.

The Board appreciates the opportunity to submit its comments.

Sincerely,

JOHN H. CROOKER, Jr.,
Chairman.

COVINGTON & BURLING,
Washington, D.C., April 7, 1969.

Hon. WARREN G. MAGNUSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MAGNUSON: You will recall that, under date of March 24, 1969, I wrote you and your Commerce Committee, on behalf of Western Air Lines, in regard to S. 1373 and the Western Air Lines situation.

I referred in that letter to Western's petition to the CAB for a declaratory ruling, and enclosed copies of papers in regard thereto. The CAB now has entered an order on the petition. I enclose a copy. The Committee doubtless will wish to have that order, and this further letter, in its record on S. 1373.

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The CAB order refuses to rule, one way or the other, on the applicability of Section 408 of the Federal Aviation Act to the acquisition of control which was the subject of Western's petition. The order states that, to resolve the question, a more complete development of the pertinent facts is necessary. It refers to the pending complaint of Western, filed under Section 408, wherein the issue is presented. With my previous letter to the Committee I had enclosed a copy of that complaint.

Appropriate proceedings now will go forward in connection with the complaint. In the meantime Western's situation remains clouded. As explained in my prior letter and in my supplementary oral testimony to your Committee, an amendment to S. 1373 removing the cloud is urgently needed. Indeed, with the CAB's refusal to rule on the question in response to the petition for a declaratory ruling, and its deferment of the question to the complaint procedure (which can be very time consuming), the need for the indicated legislative action is even more compelling than it had seemed initially.

Your committee's courtesy in giving attention to this problem is deeply appreciated.

Respectfully yours,

HOWARD C. WESTWOOD.

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 2nd day of April, 1969

Docket 20786

In the Matter of the Petition of

WESTERN AIR LINES, INC.

for a Declaratory Ruling

ORDER DISMISSING PETITION FOR DECLARATORY RULING

Western Air Lines, Inc. has filed a petition pursuant to 5 U.S.C. 554(e) (formerly Section 5(d) of the Administrative Procedure Act) requesting a declaratory answer to the question whether Mr. Kirk Kerkorian, who recently acquired a substantial amount of Western's outstanding common stock, and persons in privity with him, may serve on Western's board of directors without Board approval under Section 409 of the Act.[1] Western also requests a ruling as to whether Mr. Kerkorian's acquisition of Western's stock and convertible debentures without Board approval constituted a violation of Section 408. Inherent in both of these broad questions is the more particular question whether Mr. Kerkorian controls other enterprises which are engaged in air transportation or some other phase of aeronautics.

Mr. Kerkorian has filed an answer to the petition in which he not only interposes no objection to the Board's issuance of a declaratory ruling, but urges that the Board do so. It is his contention that the Board should answer Western's questions in the negative and should disclaim jurisdiction over both his acquisition of Western's stock and his freedom to sit on Western's board of directors and to nominate other directors who are in privity with him.

The purpose of 5 U.S.C. 554(e) "is to develop predictability in the law by authorizing binding determinations . . ." *Attorney General's Manual on the Administrative Procedure Act*, p. 59 (1947). Accordingly, "a necessary condition of its . . . use is that it be employed only in situations where the critical facts can be explicitly stated . . ." (*Op. Cit.*, p. 60).

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[1] Mr. Kerkorian is said to have acquired 20 to 25 percent of Western's outstanding common stock, as well as substantial amounts of the carrier's convertible debentures which, if converted and added to the stock already acquired, would amount to approximately 30 percent of Western's common stock.

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The Board does not deem it necessary to set forth here a lengthy recital of the allegations of the petition and answer.[2] Suffice it to say that the requisite factual certainty for a definitive ruling is lacking. Indeed, Western concedes that it "cannot assure this Board that its recital of the facts includes all the facts or considerations that are pertinent." While the answer is more detailed and has been verified, the Board is of the opinion that there still remains an inadequate basis for a binding determination. The basic questions depend upon the answers to questions of corporate control and intercorporate relationships, as well as the character of the activities of enterprises which Mr. Kerkorian controls. On the basis of the limited facts and materials now before it, the Board does not feel that it can reach a binding determination on the questions at issue. The applicable legal principles, of course, are well established, but the factual detail requisite to their correct application is lacking. Moreover, on March 20, 1969, Western filed a formal complaint charging Mr. Kerkorian with having acquired control of Western in violation of Section 408 and of seeking to enlarge his control.[3] The Board therefore finds that issuance of a declaratory order would be inappropriate and Western's petition will be dismissed.

Accordingly, is is ordered:

1. That the Petition of Western Air Lines, Inc., for a Declaratory Ruling be and it hereby is dismissed;

2. That Western's motion for leave to file a reply to Mr. Kerkorian's answer be and it hereby is denied.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON, *Secretary.*

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[2] In general it is suggested that Mr. Kerkorian may control Transamerica Corporation which, in turn, owns Trans International Airlines, as well as other companies engaged in other phases of aeronautics. Western also alleges that certain enterprises which Mr. Kerkorian controls are engaged either in indirect air transportation or other phases of aeronautics. Mr. Kerkorian denies that he controls Tansamerica; denies that his other enterprises are engaged in air transportation or any other phase of aeronautics; and denies that his acquisition of a large percentage of Western's voting stock was an acquisition of control of Western.

[3] The day after it filed its complaint, Western filed a motion for leave to file a reply to Mr. Kerkorian's answer. The proffered reply consists largely of legal argument in support of the contention that Mr. Kerkorian has acquired control of Western. These arguments do not alter our view as to the appropriate disposition of the petition, and we will deny leave to file the reply.

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